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**THE  
MASSACHUSETTS LAW  
OF  
LANDLORD AND TENANT**



**THE  
MASSACHUSETTS LAW  
OF  
LANDLORD AND TENANT**

**INCLUDING THE CASES IN VOL. 238 OF THE  
REPORTS AND THE LEGISLATION OF 1921**

**BY  
PRESCOTT F. HALL**

**OF THE SUFFOLK BAR**

**AUTHOR OF "MASSACHUSETTS BUSINESS CORPORATIONS,"  
"EXAMINATION OF LAND TITLES," ETC.**

**THIRD EDITION  
REVISED AND ENLARGED**

**BOSTON  
LITTLE, BROWN, AND COMPANY  
1922**



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## PREFACE TO THE THIRD EDITION

The publication of this edition has been delayed to await the consolidation of the statutes. During the twelve years which have elapsed since the issuing of the second edition, many cases relating to landlord and tenant have been decided in this state.

The section numbers in this edition are the same as in the preceding edition, some new lettered sections being added.

P. F. H.

11 PEMBERTON SQ., BOSTON,  
1920.

### NOTE

The author, having passed away before the publication of the General Laws, which he intended to cite in the present edition, it became necessary to select a posthumous editor to complete the work, and cover the period of two years following the author's incapacity and death. This edition has been brought to date with the decisions in Volume 238 of the Massachusetts Reports, and the legislation of 1921. References to the General Laws of 1920 have been inserted.

HARVEY C. VOORHEES

BOSTON,  
*April*, 1922.

## PREFACE TO THE FIRST EDITION

The Reports of Massachusetts are peculiarly rich in decisions upon questions of landlord and tenant law, and therefore a more complete treatment is possible in a local book upon this subject than is the case with many other branches of the law.

The author has attempted in this book to do four things: *First.* To summarize the law of Massachusetts as to landlord and tenant in such detail as to furnish a complete index to the decisions. *Second.* To state that law as far as possible in the language of the court itself. *Third.* To state the facts and to quote from the opinions in the various cases with such fulness that a tedious comparison of the cases themselves may be often dispensed with by the reader. *Fourth.* To give not only the substantive law but matters of pleading, practice and evidence together with forms and practical suggestions. Great pains have been taken to give the sources of all statutes cited and to make the statutory citations complete.

While the limits of a local book forbid an extended reference to decisions of other jurisdictions, many of such decisions have been cited, and some topics not strictly belonging to the law of landlord and tenant have been incorporated, such as the statutory lien of boarding-house keepers.

P. F. H.

89 STATE ST., BOSTON,  
May, 1899.

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# THE MASSACHUSETTS LAW OF LANDLORD AND TENANT

## CHAPTER I

### WHEN THE RELATION EXISTS

§ 1. **Definition of tenancy.**—The relation of landlord and tenant exists whenever there is a contract, express or implied, by which one agrees to give the possession or occupation of lands or tenements to another, either for a definite period of time or at will.<sup>1</sup>

As the relation is founded upon a contract, it can never arise from a mere trespass without right,<sup>2</sup> but can be created only where the occupation is by consent of the holder of the land.

The contract of hiring, however, need not be formal,<sup>3</sup> and it is not necessary to the creation of a tenancy that a money rent be reserved or stipulated for.<sup>4</sup>

<sup>1</sup> Bouv. Law Dict.

*Fletcher v. McFarlane*, 12 Mass. 46; *Codman v. Jenkins*, 14 Mass. 93; *Allen v. Thayer*, 17 Mass. 299; *Boston v. Binney*, 11 Pick. 1; *Fiske v. Framingham Mfg. Co.*, 14 Pick. 491, 493; *Patch v. Loring*, 17 Pick. 336; *Gould v. Thompson*, 4 Met. 224; *Cobb v. Arnold*, 8 Met. 398; *Kittredge v. Peaslee*, 3 Allen, 235; *Knowles v. Hull*, 99 Mass. 562; *Merrill v. Bullock*, 105 Mass. 486; *Central Mills v. Hart*, 124 Mass. 123; *Leonard v. Kingman*, 136 Mass. 123; *Lindsey v. Leighton*, 150 Mass. 285; *Rogers v. Coy*, 164 Mass. 391.

<sup>2</sup> *Central Mills v. Hart*, 124 Mass. 123; *Whitney v. Dart*, 117 Mass. 153.

<sup>3</sup> *Eastman v. Perkins*, 111 Mass. 30; *Central Mills v. Hart*, 124 Mass. 123. In the former case the contract consisted of a memorandum on a receipted bill of hay and oats, as follows: "Left at stable on O. street, where A. B. takes possession. Rent to begin Oct. 1, 1870, for one year, at \$150.00 C. D." This was held to be a lease.

<sup>4</sup> Thus, in *Fiske v. Framingham Mfg. Co.*, 14 Pick. 491, there was an express provision that no rent was to be charged, but it appeared that

Where the statute does not attempt to regulate or modify the contractual relations of the parties it should not be broadened, or a construction adopted by implication which would materially limit the rights of parties to enter into such lawful contracts as they please, and the statute of 1907, c. 550, § 127 [relating to City of Boston], should not be so broadened in construction.<sup>5</sup>

§ 2. **Kinds of tenancy.**—Speaking generally, one who possesses lands or tenements by any kind of title is a “tenant.” Thus there may be tenancy in fee, or for life, in dower, or in joint tenancy. But, in the popular sense of the term, and for the purposes of the present work, there are only three kinds of tenants, viz.:

1. Tenant for years. Any one holding by a written lease, even for a time less than a year, is a tenant for years.<sup>6</sup>

2. Tenant at will. This relation is created in a variety of ways, but always exists where there is a demise, but no written lease.<sup>7</sup>

3. Tenant at sufferance. Such a person is not a tenant at all in the sense of having any privity with the owner of the soil, but is one who has the mere naked possession of the premises without right, although when he first entered he may have had a right as being a tenant for years, or at will.<sup>8</sup>

There was formerly another kind of tenancy, called “tenancy from year to year,” which still exists in some jurisdictions, but in this Commonwealth its place is taken by tenancy at will.<sup>9</sup>

the lessee manufactured goods for the lessor at a reduced rate. So, also, in *Hooton v. Holt*, 139 Mass. 54, where a tenant at will was to occupy for life without payment of any rent.

<sup>5</sup> *Palmigiani v. D'Argenio*, 234 Mass. 434; *Ryalls v. Mechanics' Mills*, 150 Mass. 190; *Barriere v. Depatie*, 219 Mass. 33, 35, 36; *Vallen v. Cullen*, 238 Mass. 145.

<sup>6</sup> See *infra*, §§ 10, 21. St. 1888, c. 390, § 40, authorizing a collector of taxes to sell rents and profits for a term of years creates no tenancy between the purchaser and the original owner. See St. 1900, c. 376; G. L., c. 60, § 43.

<sup>7</sup> See *infra*, §§ 152–157.

<sup>8</sup> See *infra*, § 179.

<sup>9</sup> *Ellis v. Paige*, 1 Pick. 43. *Cp. Ellis v. Paige*, 2 Pick. 71n; *Withers v. Larrabee*, 48 Me. 570. For the incidents of tenancy from year to year, see 1 Taylor, *Landl. & Ten.*, 9th ed., §§ 54–58.

A mere intention of landlord and tenant to continue or renew their



§ 3. **Tenancy distinguished from license.**<sup>10</sup>—To constitute a tenancy there must be not only a contract but also an actual or constructive possession of the land; and a mere entry, more or less frequently, upon the premises, though with the knowledge and consent of the owner, is a mere revocable *license*, not a tenancy.<sup>11</sup> In other words, if the party entering is to have exclusive possession of the premises against all the world including the owner, there is a tenancy; but, if he is occupying under the owner, it is a license and his rights rest in contract merely.<sup>12</sup>

Thus, in one case,<sup>13</sup> there was an agreement by the proprietors of a meetinghouse that a charitable society might hold meetings in the basement of the church, if the society would contribute to the expense of fitting it up. The contribution was made and the society held its meetings there, but the room was also used by other persons. The agreement was held to be a mere revocable license and to create no tenancy.<sup>14</sup>

So a "lease" of a building "for four nights, . . . building to be lighted," is a license;<sup>15</sup> or an agreement to allow a person to use a hall in a building for dancing parties on certain after-

relation indefinitely, does not create an interest in land on the theory of an English customary tenant right. *Emery v. Boston Terminal Co.*, 178 Mass. 172, 185.

<sup>10</sup> As to the right of a tenant to give licenses to strangers see *infra*, §§ 102, 188.

<sup>11</sup> *Central Mills v. Hart*, 124 Mass. 123; *Rockport v. Rockport Granite Co.*, 177 Mass. 246 (license to quarry rock paid by number of blocks); *Albiani v. Evening Traveller Co.*, 220 Mass. 20, 25 (allowing a tailor and a bootblack to occupy temporarily a small portion of the premises).

<sup>12</sup> *Roberts v. Lynn Ice Co.*, 187 Mass. 402, 406. Cf. *Boston Fish Market Corp. v. Boston*, 224 Mass. 31, 33.

<sup>13</sup> *Hamblett v. Bennett*, 6 Allen. 140.

<sup>14</sup> Hoar, J., said, p. 145: "The Circle was a changeable and fluctuating body. . . . The understanding and agreement do not appear to have gone farther than the license and consent usually given to a Sunday school or choir, or church, connected with a parish or religious society, to occupy some room in the meeting house for the objects of its particular department. In such a case, the purpose to create a tenancy at will or tenancy in common, would be extraordinary and improbable. The relation of the parties and all the circumstances indicate rather a license revocable at the pleasure of the society, who retain the general control of the building."

<sup>15</sup> *Oxford v. Leathe*, 165 Mass. 254.

noons,<sup>16</sup> or to run a restaurant,<sup>17</sup> or a music department of a general store,<sup>18</sup> or a candy counter,<sup>19</sup> on premises of the licensor. So, also, are the licenses evidenced by theatre tickets and the like.<sup>20</sup> An agreement by the lessee of a building to allow a third person, for an annual payment, to place a sign on the outside wall of the building, is a mere license, and not a breach of the covenant not to underlet.<sup>21</sup> And the same is true of a contract for the erection of a fence for advertising purposes.<sup>22</sup>

So the right of a contractor engaged in the erection of a building to place a steam engine and other tools used in construction upon the land is only an implied license, and the owner of the land may remove them to another part of the premises doing no unnecessary damage to them.<sup>23</sup>

So a vote of a city board, that one whose estate has been terminated by eminent domain, but who has continued in occupation, shall pay for said period of occupation, and in future "if not disturbed" at a certain rate, "and at a proportionate rate if his occupancy is disturbed," does not create any tenancy.<sup>24</sup> But a contract to give "the use and benefit of" certain ice houses is a lease and not a license.<sup>25</sup>

The word "let" in the agreement is not of controlling significance.<sup>26</sup> Nor is the receiving of "rent."<sup>27</sup>

Payments under a license cease where the premises are destroyed by fire, as the use contracted for is then not furnished.<sup>28</sup>

<sup>16</sup> *Johnson v. Wilkinson*, 139 Mass. 3.

<sup>17</sup> *De Montague v. Bacharach*, 181 Mass. 256.

<sup>18</sup> *R. H. White Co. v. Remick & Co.*, 198 Mass. 41.

<sup>19</sup> *Kelley v. W. D. Quimby & Co., Inc.*, 227 Mass. 93 (dealing with the liability of a licensee for injury to his customers).

<sup>20</sup> *Burton v. Scherpf*, 1 Allen, 133; *McCrea v. Marsh*, 12 Gray, 211.

<sup>21</sup> *Lowell v. Strahan*, 145 Mass. 1. *Cf. Stevenson v. Donnelly*, 221 Mass. 161, 165.

<sup>22</sup> *Jones v. Donnelly*, 221 Mass. 213

<sup>23</sup> *Shea v. Milford*, 145 Mass. 525. *Cp. Lash v. Ames*, 171 Mass. 487.

<sup>24</sup> *Wiley v. Boston*, 181 Mass. 233.

<sup>25</sup> *Roberts v. Lynn Ice Co.*, 187 Mass. 402.

<sup>26</sup> *Jones v. Donnelly*, 221 Mass. 213; *White v. Maynard*, 111 Mass. 250; *Johnson v. Wilkinson*, 139 Mass. 3; *Oxford v. Leathe*, 165 Mass. 254; *Congregation Beth Israel v. O'Connell*, 187 Mass. 236; *R. H. White Co. v. Remick & Co.*, 198 Mass. 41.

<sup>27</sup> *Jones v. Donnelly*, 221 Mass. 213; *De Montague v. Bacharach*, 181 Mass. 256.

<sup>28</sup> *Roberts v. Lynn Ice Co.*, 187 Mass. 402.

Agreements for such licenses need not be in writing.<sup>29</sup>

"Licenses, which in their nature amount to the granting of an estate for ever so short a time, are not good without deed, and are considered as leases. . . . Licenses to do a particular act do not in any degree trench upon the policy of the law, which requires that bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass."<sup>30</sup>

If the owner of land lets another into joint occupation, with no contract or agreement respecting it between the parties, the seisin and possession would be considered to be in the one who had right, and there is no tenancy.<sup>31</sup> But it has been held that the lessee of "the sole and exclusive right to cut and carry away" from a millpond, "all such ice as can be so cut in form and shape to use, either for private use or as merchandise," the lessor reserving the right to cut all ice needed for his own use, was not a mere licensee.<sup>32</sup> On the other hand, a contract to give "the use and benefit of" certain ice houses, is a lease and not a license.<sup>33</sup>

The question whether a given contract is a lease or a license is one of construction, and therefore is a question of law.<sup>34</sup> And the mere fact that the terms "lease" and "sublet" occur in the agreement will not control the true nature of the contract.<sup>35</sup>

Where an agreement for a license contains a clause against assigning, and a provision that the agreement may be terminated by the licensor on breach, and the licensee assigns his interest and the licensor notifies him of the breach and says he will hold him for damages, the licensor is acting under his common-law rights and not under the agreement.<sup>36</sup>

In such a case the measure of damages is the difference between the contract price and what the licensor received,

<sup>29</sup> See G. L., c. 259, § 1, cl. 4.

<sup>30</sup> *Cook v. Stearns*, 11 Mass. 533, 538, per Parker, C. J.

<sup>31</sup> *Johnson v. Carter*, 16 Mass. 443.

<sup>32</sup> *Richards v. Gauffret*, 145 Mass. 486.

<sup>33</sup> *Roberts v. Lynn Ice Co.*, 187 Mass. 402.

<sup>34</sup> *Ibid.*

<sup>35</sup> *R. H. White Co. v. Remick & Co.*, 198 Mass. 41.

<sup>36</sup> *Ibid.*

taking into account the use he made of the space and his duty to use it so as to diminish the damages.<sup>37</sup>

An action for use and occupation will not lie to recover compensation for a license.<sup>38</sup>

§ 4. **Tenancy distinguished from lodgings.**—A letting of lodgings is a species of license.<sup>39</sup> Whether a hiring of rooms creates a tenancy, depends upon whether the rooms hired are so separated from the rest of the house in respect to possession and control that, in the eye of the law, they can form a separate tenement.<sup>40</sup>

Thus, a letting of rooms in a boarding house, where the owner retains the legal possession, custody and care of the whole house and of every room therein, does not create a tenancy.<sup>41</sup> But, on the other hand, the fact that rooms are

<sup>37</sup> *R. H. White Co. v. Remick & Co.*, 198 Mass. 41.

<sup>38</sup> *Jones v. Donnelly*, 221 Mass. 213, 218.

<sup>39</sup> *Jones v. Donnelly*, 221 Mass. 213, 217.

<sup>40</sup> Thus in *Swain v. Mizner*, 8 Gray, 182, Merrick, J., said: "We think that the portion of the building occupied by the plaintiff, distinct from the hall, entry and stairway leading to it, did constitute what must be considered in law his dwelling house. . . . Thus the plaintiff occupied all the rooms on one floor of the building, and the hall or entry through which he passed to reach either of the doors opening into any of the apartments occupied by him, was used as a common passageway for all the tenants of the several portions of it. It would seem to make no difference whatever may be the character or peculiarity of the common passage by which the access to a dwelling house is attained; whether it is a public or a private way; or whether it leads from one street to another, or only into a place or court to which there is but a single entrance; or whether it is an open street or a way inclosed by buildings and covered with a roof. In the present instance the hall, entryway and stairway served as a common and public passageway for many occupants of entirely distinct habitations. . . . The apartments occupied by the plaintiff constituted, in and of themselves, a complete habitation for himself and his family. He had the sole and exclusive use and possession of them as completely as if they stood separate and apart from everything else, and were in any other distinct structure. . . . Nor can the fact that there were several doors leading from the common passageway into the different apartments occupied by the plaintiff lead to a different conclusion." Cf. *White v. Maynard*, 111 Mass. 250, for a review of English cases.

See also a lease of "chambers over the second floor" in *Shumway v. Collins*, 6 Gray, 227.

<sup>41</sup> *Peaks v. Cobb*, 197 Mass. 554. And such a letting is not, therefore, within the statute of frauds. *White v. Maynard*, 111 Mass. 250.

let under an agreement to supply food and furnishings and to do housework and cleaning, will not prevent the letting from creating a tenancy, or change the essential character of the instrument of demise.<sup>42</sup> There may be two or more distinct tenements under one roof, and they may be either side by side or one above another.<sup>43</sup> A mere lodger is liable to have his rooms forcibly entered by an officer serving civil process, but a tenant is not so liable, even though the officer is permitted to enter the common doorway and entry.<sup>44</sup>

As to the bearing of a provision as to the abatement of rent in case of fire on the question whether a tenancy was intended, see *infra*, § 137.

§ 5. Tenancy as between mortgagor and mortgagee.—Mortgagor as tenant of mortgagee.—Whether a mortgagor is now liable, by statute, for rent after an entry by the mortgagee, seems to be in doubt;<sup>45</sup> but there is no question that the relation of landlord and tenant may be created by agreement between the parties in such a case.<sup>46</sup>

“A mortgagor in possession is sometimes, in a loose sense, said to be tenant at will to the mortgagee. But he is not liable to rent, or to account for rents and profits; these he holds to his own use. He is like a tenant at will, because the mortgagee may enter upon the estate at his will, if he can do so peaceably, when not restrained by covenant.”<sup>47</sup> No notice to the mortgagor to quit is necessary.<sup>48</sup> If rent has accrued before the entry although not paid, the mortgagee is not entitled to it.<sup>49</sup>

Where an agreement was made by the mortgagee with the mortgagor after entry, by which the latter was to carry

<sup>42</sup> *Porter v. Merrill*, 124 Mass. 534.

<sup>43</sup> *Meeting House v. Lowell*, 1 Met. 541; *Loring v. Bacon*, 4 Mass. 575.

<sup>44</sup> *Swain v. Mizner*, 8 Gray, 182.

<sup>45</sup> *Morse v. Merritt*, 110 Mass. 458; *Porter v. Hubbard*, 134 Mass. 233. See 1 Taylor, Landl. & Ten., 9th ed., § 121.

<sup>46</sup> *Murray v. Riley*, 140 Mass. 490.

And if the husband of the mortgagor, who has joined in the mortgage deed but has not signed the note, agrees with the mortgagee after entry to pay rent until the premises are sold, this constitutes him a tenant of the mortgagee. *Granger v. Parker*, 137 Mass. 228.

<sup>47</sup> *Larned v. Clarke*, 8 Cush. 29, 31, per Shaw, C. J.

<sup>48</sup> *Lackey v. Holbrook*, 11 Met. 458.

<sup>49</sup> *Mass. Hospital Life Ins. Co. v. Wilson*, 10 Met. 126; *Hammond v. Thompson*, 168 Mass. 531.

on a certain farm, and the mortgagor assigned his interest and agreed that the assignee should carry on the farm, it was held there was no relation of landlord and tenant between the assignee and the mortgagee, and that the latter was entitled to the crops.<sup>50</sup>

§ 6. **Mortgagee as tenant of mortgagor.**—When a mortgagee enters into possession of the mortgaged land, he does not thereby become a tenant of the mortgagor.<sup>51</sup> But if, under the mortgage, the mortgagor is to remain in possession, he may lease the premises to the mortgagee as well as to a stranger. In this case, the mortgagee cannot claim that the mortgage extinguishes the lease, and he is liable to pay the agreed rent. The very fact that a lease is so given is evidence that the right of possession was to remain in the mortgagor under the mortgage. If the mortgagee refuse to pay the rent, this amounts to a claim that he holds under the mortgage, and he must apply the rental value in reduction of the mortgaged debt.<sup>52</sup>

§ 7. **Effect of mortgage on subsequent lease.**—A mortgagor has no power to lease unless he has reserved the possession to himself until breach of condition; but, if he makes a lease, it is good between the parties and against all persons except the mortgagee and those claiming under him.<sup>53</sup> Where the mortgagor makes a lease of the premises to a third person, and then the mortgagee enters for condition broken and notifies the tenant to pay rent to himself instead of to the mortgagor, the third person becomes thereupon tenant of the mortgagee;<sup>54</sup> and this is so even though the entry of the mortgagee

<sup>50</sup> *Porter v. Hubbard*, 134 Mass. 233.

<sup>51</sup> *Wood v. Felton*, 9 Pick. 171.

<sup>52</sup> *Newall v. Wright*, 3 Mass. 138; *Wood v. Felton*, 9 Pick. 171, 175. *Cp.* *Cary v. Whiting*, 118 Mass. 363, cited *infra*.

Such refusal to pay rent is sufficient notice to the mortgagor that he claims to hold under the mortgage. *Newall v. Wright*, 3 Mass. 138. See also *Wood v. Felton*, 9 Pick. 171, 175.

<sup>53</sup> *Keith v. Swan*, 11 Mass. 216; *Willington v. Gale*, 7 Mass. 138. *Cp.* *O'Brien v. Shea*, 208 Mass. 528.

<sup>54</sup> *Tilden v. Greenwood*, 149 Mass. 567; *Stone v. Patterson*, 19 Pick. 476; *Welch v. Adams*, 1 Met. 494; *Adams v. Bigelow*, 128 Mass. 365; *Shepard v. Richards*, 2 Gray, 424; *Knowles v. Maynard*, 13 Met. 352; *Russell v. Allen*, 2 Allen, 42; *Mirick v. Hoppin*, 118 Mass. 582; *Lucier v. Marsales*, 133 Mass. 454; *Cook v. Johnson*, 121 Mass. 326. See *Reed v. Davis*, 4 Pick. 216; *Smith v. Shepard*, 15 Pick. 147; *Fitchburg Mfg. Co. v. Melven*,

is ineffectual to foreclose the mortgage<sup>55</sup> because not properly made, as, for example, because the certificate of entry was not recorded within the legal period. In such a case a subsequent entry to effect foreclosure is not a waiver of the mortgagee's right to the rents as established by the first entry.<sup>56</sup> The same result follows if the tenant of the mortgagor upon whom the mortgagee enters, is a tenant at will, as when he is in under a lease.<sup>57</sup> Of course the power of the mortgagor to lease lasts only until an entry by the mortgagee for condition broken, and the mortgagee cannot after such entry orally confirm leases so made.<sup>58</sup>

The power of the mortgagor to lease lasts only until an entry by the mortgagee for condition broken.<sup>59</sup> Upon entry, the mortgagee may elect to treat the lease as at an end and may expel the lessee; or he may agree to accept the lessee as tenant to himself. But, in the latter case, there must be something more than a mere verbal agreement confirming the

15 Mass. 268. *Cp.* *Ellis v. Boston, etc., R. R. Co.*, 107 Mass. 1, 36.

<sup>55</sup> *Stone v. Patterson*, 19 Pick. 476; *Cook v. Johnson*, 121 Mass. 326; *Welch v. Adams*, 1 Met. 494; *Shepard v. Richards*, 2 Gray, 424.

<sup>56</sup> *Cook v. Johnson*, 121 Mass. 326.

An entry under a conditional judgment for possession does waive an entry for condition broken. *Fay v. Valentine*, 5 Pick. 418, but see *Page v. Robinson*, 10 Cush. 99. But the commencement of a foreclosure suit by a mortgagee in possession, is not an abandonment of the possession. *Page v. Robinson*, 10 Cush. 99; *Dorrell v. Johnson*, 17 Pick. 263; *Merriam v. Merriam*, 6 Cush. 91; *Mann v. Earle*, 4 Gray, 299.

So the entry to foreclose a mortgage is not waived by the mortgagee in bringing a writ of entry against a tenant of the mortgagor and obtaining judgment for possession, but not seeking conditional judgment nor causing the writ of possession to be served until after three years have elapsed from the recording of the certificate of entry. *Fletcher v. Cary*, 103 Mass. 475. See further on this point, *Swift v. Mendell*, 8 Cush. 357; *Thayer v. Smith*, 17 Mass. 429; *Bennett v. Conant*, 10 Cush. 163; *Ellis v. Drake*, 8 Allen, 161; *Lennon v. Porter*, 5 Gray, 318; *Walcutt v. Spencer*, 14 Mass. 409; *Palmer v. Fowley*, 5 Gray, 545; *Green v. Kemp*, 13 Mass. 515.

<sup>57</sup> *Lucier v. Marsales*, 133 Mass. 454; *Mass. Hospital Life Ins. Co. v. Wilson*, 10 Met. 126.

The case is precisely similar to that where the premises are sold by the owner. *Bunton v. Richardson*, 10 Allen, 260. *Cp.* *Merrill v. Bullock*, 105 Mass. 486; *Flood v. Flood*, 1 Allen, 217.

<sup>58</sup> *Haven v. Adams*, 4 Allen, 80.

<sup>59</sup> *Ibid.*



lease, for that would amount to leasing an estate for years by parol.<sup>60</sup>

The mortgagee, having a title paramount has the right to enter and evict the lessee, to prevent which the lessee has the right to pay rent to him.<sup>61</sup> It seems, however, that a mere entry to foreclose by a mortgagee does not put an end to the lease, as it does not change the title but merely gives a right to the rents. That a sale on foreclosure does terminate the lease is held in some states;<sup>62</sup> while in others it is held that the purchaser at the foreclosure sale may either affirm or dis-affirm the lease.<sup>63</sup>

Where the mortgagee enters for condition broken, he is entitled to all rent accruing after his entry, and there is no apportionment between the mortgagee and the mortgagor;<sup>64</sup> on the other hand, a mortgagor before entry by the mortgagee is not tenant of the mortgagee, and is entitled to the rents and profits,<sup>65</sup> unless there be an express agree-

<sup>60</sup> Haven v. Adams, 4 Allen, 80.

<sup>61</sup> Knowles v. Maynard, 13 Met. 352; Smith v. Shepard, 15 Pick. 147; Welch v. Adams, 1 Met. 494.

<sup>62</sup> Burr v. Stenton, 52 Barb. 377, 43 N. Y. 462; Barelli v. Szymanski, 14 La. Ann. 47; Oakes v. Aldridge, 46 Mo. App. 11; Alford v. Carver, 31 Tex. Civ. Ap. 607.

<sup>63</sup> Duff v. Wilson, 69 Pa. St. 316.

<sup>64</sup> Knowles v. Maynard, 13 Met. 352, 355. Cp. Massachusetts Hospital Life Ins. Co. v. Wilson, 10 Met. 126; Fitchburg Cotton Mfg. Co. v. Melven, 15 Mass. 268; Burden v. Thayer, 3 Met. 76; Goodwin v. Richardson, 11 Mass. 469; Hammond v. Thompson, 168 Mass. 531. See Smith v. Shepard, 15 Pick. 147.

Where no rent has become payable at the time of the entry, and the lessee has attorned to the mortgagee, the lessor cannot maintain an action against the lessee upon a *quantum meruit*, for use and occupation before the entry. Hammond v. Thompson, 168 Mass. 531, 533.

<sup>65</sup> Wilder v. Houghton, 1 Pick. 87; Hastings v. Pratt, 8 Cush. 121; Porter v. Hubbard, 134 Mass. 233; Boston Bank v. Reed, 8 Pick. 459; Gibson v. Farley, 16 Mass. 280; Mayo v. Fletcher, 14 Pick. 525; Mayo v. Shattuck, 14 Pick. 525; Smith v. Shepard, 15 Pick. 147; Russell v. Allen, 2 Allen, 42; Fitchburg Cotton Mfg. Co. v. Melven, 15 Mass. 268; Field v. Swan, 10 Met. 112; Mass. Hospital Life Ins. Co. v. Wilson, 10 Met. 126; Holmes v. Turner's Falls Co., 142 Mass. 590; Tilden v. Greenwood, 149 Mass. 567; Teal v. Walker, 111 U. S. 242; Elmore v. Symons, 183 Mass. 321.

And the same holds true of an assignee of the mortgagor. Wilder v. Houghton, 1 Pick. 87; Fitchburg Cotton Mfg. Co. v. Melven, 15 Mass. 268, 270. See Boston Bank v. Reed, 8 Pick. 459.



ment in the mortgage making the mortgagor tenant for years.<sup>66</sup>

In order for the mortgagee after entry to be entitled to the rents, he must not only make an entry, but must give notice to the tenants to pay rent to him.<sup>67</sup> There must be an entry,<sup>68</sup> however, and a notice by a mortgagee to tenants, not amounting to an entry or assumption of possession, is not enough to defeat the right of the mortgagor to the rents.<sup>69</sup> On the other hand, the entry need not be such an entry as would be effectual to foreclose the mortgage.<sup>70</sup>

In case of the redemption of the mortgage after condition broken, it is provided by statute that, if the mortgagee or any person under him has had possession of the premises, he shall account for rents and profits, and shall be allowed for all sums expended for reasonable repairs and improvements, taxes and all other necessary expenses.<sup>71</sup>

§ 8. Effect of mortgage on prior lease.—If the owner of the land makes a lease first, and then grants the reversion by deed or mortgage, the grantee or mortgagee becomes the landlord in his stead, and without any entry.<sup>72</sup> In this class

<sup>66</sup> *Haven v. Adams*, 4 Allen, 80, 90. *Cp. Mayo v. Fletcher*, 14 Pick. 525; *Wilder v. Houghton*, 1 Pick. 87, 89.

<sup>67</sup> *Elmore v. Symons*, 183 Mass. 321; *Tilden v. Greenwood*, 149 Mass. 567; *Stone v. Patterson*, 19 Pick. 476; *Welch v. Adams*, 1 Met. 494.

<sup>68</sup> *Elmore v. Symons*, 183 Mass. 321; *Field v. Swan*, 10 Met. 112, 114; *Tilden v. Greenwood*, 149 Mass. 567, 569; *Morse v. Goddard*, 13 Met. 177.

<sup>69</sup> *Elmore v. Symons*, 183 Mass. 321.

<sup>70</sup> *Welch v. Adams*, 1 Met. 494; *Reed v. Davis*, 4 Pick. 216.

<sup>71</sup> G. L., c. 244, § 20. See *Saunders v. Frost*, 5 Pick. 259, 270; *Miller v. Lincoln*, 6 Gray, 556; *Sanford v. Pierce*, 126 Mass. 146; *Hubbard v. Shaw*, 12 Allen, 120; *O'Brien v. McNeil*, 199 Mass. 164, 171.

<sup>72</sup> *Commonwealth v. Leach*, 1 Mass. 61; *Farley v. Thompson*, 15 Mass. 25, 26; *Burden v. Thayer*, 3 Met. 76; *Newall v. Wright*, 3 Mass. 138; *Fitchburg Cotton Mfg. Co. v. Melven*, 15 Mass. 268; *Russell v. Allen*, 2 Allen, 42; *Mirick v. Hoppin*, 118 Mass. 582; *Holmes v. Turner's Falls Co.*, 142 Mass. 590; *Noble v. Brooks*, 224 Mass. 288.

In *Cary v. Whiting*, 118 Mass. 363, the owner of leased property made a mortgage to the lessee, containing a provision that the instalments as they became due under the mortgage should be paid in rent to the extent to which rent became due under the lease. Before the mortgage the lessor endorsed an agreement upon the lease, to the effect that, if a debt due to the lessee was not paid before the end of the lease, the lessees might hold at the same rent until the debt was paid. Several instalments of the mortgage became due before any rent was due. It was held that the

of cases, the tenant cannot plead an oral agreement between the mortgagor and mortgagee that the former should receive the after-accruing rent.<sup>73</sup>

Even if the lease passes by the mortgage, the lessee has the right of possession against all persons except the mortgagee, until the expiration of three years from the entry, and can sue a third person for a trespass within that time.<sup>74</sup>

The mortgagee should notify the tenant of the mortgage in order to hold him for after-accruing rent.<sup>75</sup>

It is usual to provide that until foreclosure for breach of condition of a mortgage the mortgagor shall continue to receive the rents and profits.

§ 9. *Tenancy by estoppel.*—In the same way in which a tenant, having entered into the relation of landlord and tenant by demise and occupation of the premises, is estopped to deny his landlord's title,<sup>76</sup> or a landlord is estopped to deny his lease,<sup>77</sup> so one who has leased premises, whether by parol or written lease, having no title at the time of the demise, is bound by the lease if he afterward acquire the land, and if the true owner has meanwhile done nothing to disturb the efficacy of the lease.<sup>78</sup>

But where the lessor has some interest, there is no estoppel, and any subsequent acquiring by him acts by way of confir-

mortgagee was entitled to foreclose for breach of the condition as to payment, in spite of the provision as to rent.

*Historical.—Attornment.* It was formerly necessary for the tenant to assent to the change of landlords by a process called *attornment*, but this is not now necessary. It has been dispensed with both by the English statute, 4 Anne c. 16, § 9, and by long usage in this commonwealth. *Commonwealth v. Leach*, 1 Mass. 61; *Farley v. Thompson*, 15 Mass. 25, 26; *Burden v. Thayer*, 3 Met. 76; *Marsters v. Cling*, 163 Mass. 477; *Taylor v. Kennedy*, 228 Mass. 390, 394. The grantee or mortgagee is of course entitled only to rent accruing after the change of ownership. *Burden v. Thayer*, 3 Met. 76. See *infra*, § 53.

<sup>73</sup> *Russell v. Allen*, 2 Allen, 42.

<sup>74</sup> *Martin v. Tobin*, 123 Mass. 87.

<sup>75</sup> *Farley v. Thompson*, 15 Mass. 18; *Russell v. Allen*, 2 Allen, 42, 44; *Wood v. Partridge*, 11 Mass. 488; *Mirick v. Hoppin*, 118 Mass. 582, 587; *Adams v. Bigelow*, 128 Mass. 365, 366; *Noble v. Brooks*, 224 Mass. 288, 291.

<sup>76</sup> See *infra*, § 205.

<sup>77</sup> See *infra*, §§ 205-208.

<sup>78</sup> *Comstock v. Smith*, 13 Pick. 120; *Kendall v. Carland*, 5 Cush. 80.

mation; and the same is true where several persons join in a lease and one only has an interest.<sup>79</sup>

An assignee of a landlord or tenant by estoppel stands in as good a position as his assignor and may sue on the covenants of the lease.<sup>80</sup>

<sup>79</sup> 1 Taylor, Landl. & Ten., 9th ed., § 87. See also *Skidmore v. R. R. Co.*, 112 U. S., 33, and as to tenants in common, *infra*, § 28.

<sup>80</sup> *Patten v. Deshon*, 1 Gray, 325; *Dunshee v. Grundy*, 15 Gray, 314.

## CHAPTER II

### TENANCY FOR YEARS UNDER A WRITTEN LEASE

#### SECTION I

##### VALIDITY AND SUBJECT-MATTER OF LEASES

§ 9a. Nature of term for years.—Originally a term for years was regarded as a chattel interest in real estate. But chattels real were always sharply distinguished from chattels personal, and so far as modern recording acts go, leaseholds are considered in the nature of real estate rather than personal property.<sup>1</sup>

§ 10. Form of lease.—When the relation of landlord and tenant is created by an express contract in writing, the instrument used for the purpose is called a lease.<sup>2</sup>

“Whatever words are sufficient to explain the intent of the parties that the one shall divest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a license, covenant or agreement are of themselves sufficient, and will in construction of law amount to a lease for years.”<sup>3</sup>

Leases are usually made in duplicate, signed by both lessor

<sup>1</sup> Friedman v. Bloomberg, 225 Mass. 491, 493. Cf. *infra*, § 43.

<sup>2</sup> “It has often been regretted by judges . . . that an instrument of such familiar use as a lease for years should be so loosely and inartificially drawn, and leave so much doubt and uncertainty as to the real intent and meaning of the parties. It probably arose from using at first a very brief and imperfect form, and from introducing particular provisions from time to time, as the necessity for them was felt, without much regard to the collocation of the particular clause introduced, or its connection with the sentence in which it was inserted; by means of which much obscurity and ambiguity has pervaded the instrument.” Shaw, C. J., in Salisbury v. Hale, 12 Pick. 416, 419.

<sup>3</sup> Bacon’s Abr., *Leases*.

A contract that the tenant shall have the “use and benefit of” premises is sufficient to pass the entire beneficial interest. Roberts v. Lynn Ice Co., 187 Mass. 402.

and lessee, each party keeping one part.<sup>4</sup> There is no presumption, however, that a given lease was executed in duplicate;<sup>5</sup> and it may be made in the form of a deed-poll, and executed only by the lessor. In such a case, if the lessee accepts the lease, he is bound by its provisions as much as if it were completely executed, although his obligation is not express but implied;<sup>6</sup> and the result is the same in the case of a bipartite lease improperly executed by the lessee.<sup>7</sup> Conversely, when a lease is executed by the lessee, and not by the lessor, and the lessee has entered and enjoyed the premises, he is liable on the covenant to pay rent, and probably on the other covenants of the lease.<sup>8</sup>

A lease is properly under seal, but even if the seal be omitted the lease is still valid as between the parties and those having actual notice of it.<sup>9</sup>

The lease need not consist of one paper only; thus, where the lessor or his agent signs a paper reciting a lease to the tenant, and the tenant signs a paper reciting that he has hired the premises, these papers amount to a present lease.<sup>10</sup>

The provisions of the lease need not follow each other in any particular order. Thus, where the body of a lease contained no provisions as to steam heat, electric light, or power for an elevator, but stipulations on these points were written below the signatures of the parties, and the parties treated them as part of the lease, it was held they did form part of the lease.<sup>11</sup>

<sup>4</sup> The lessee's copy is to prevail where there is any difference in terms between the two parts. *Burchell v. Clark*, 1 C. P. D. 602; s. c., 2 C. P. D. 88.

<sup>5</sup> *Cooley v. Collins*, 186 Mass. 507.

<sup>6</sup> Co. Lit. 143b, 47; *Shaw, C. J.*, in *Pike v. Brown*, 7 Cush. 134, 135. *Cp. Goodwin v. Gilbert*, 9 Mass. 510, 514 (case of a deed); *Nugent v. Riley*, 1 Met. 117 (case of mortgage). In this case the action was formerly *assumpsit*, and not *covenant*. See *Felch v. Taylor*, 13 Pick. 133, 136. *Cp. infra*, §§ 19, 20, 28, 31, 34-36.

<sup>7</sup> *Carroll v. St. John's Society*, 125 Mass. 565. *Cp. Penniman v. Hartshorn*, 13 Mass. 87, 91.

<sup>8</sup> *Codman v. Hall*, 9 Allen, 335, 338; *Buffington v. McNally*, 192 Mass. 198.

<sup>9</sup> *Kostopolos v. Pezzetti*, 207 Mass. 277; *Browne*, Stat. Fr., 5th ed., § 6; 1 *Taylor, Landl. & Ten.*, 9th ed., § 27.

<sup>10</sup> *Duncklee v. Webber*, 151 Mass. 408, 411; *Shaw v. Farnsworth*, 108 Mass. 357; *Bacon v. Bowdoin*, 22 Pick. 406; *Wood v. Edison, etc., Co.*, 184 Mass. 523.

<sup>11</sup> *Golding v. Brennan*, 183 Mass. 286.

## § 11 TENANCY FOR YEARS UNDER A WRITTEN LEASE

§ 11. **Distinction between a lease and an agreement for a lease.**—Whether a particular contract is a lease or merely an agreement for a lease, depends upon the intention of the parties, and such intention is to be collected from the whole instrument.<sup>12</sup> The principle seems to be “that if the instrument upon its face purports to be the contract upon which occupation is to be enjoyed, and the relations and rights of the parties to be defined, and it contains apt words to operate as a present demise, it will be so construed. Otherwise it will be regarded as an agreement only.”

“Subsequent occupation, like other acts and conduct of the parties to a contract in relation to its subject-matter, may aid, upon the question of intention in the interpretation of their agreement; but they cannot control it against the meaning of the words used, nor supply a meaning which the words themselves will not reasonably bear.”<sup>13</sup> “The form of expression ‘we agree to rent or lease,’ is far from being decisive upon this question, and does not necessarily import that a lease is intended to be given at a future day. On the contrary those words may take effect as a present demise, and the words ‘agree to let’ have been held to mean exactly the same thing as the word ‘let,’ unless there be something in the instrument to show that a present demise could not have been in contemplation of the parties. The test seems to be that if the agreement leaves nothing incomplete it may operate as a present demise.”<sup>14</sup>

“In general, when one stipulates that another shall have the use, benefit and enjoyment of real estate, definitely described, accompanied by an actual entry and enjoyment of the estate, this is evidence of a present demise.”<sup>15</sup> The ordinary expressions are “let,” “demise” or “lease,” and the clause

<sup>12</sup> *Bacon v. Bowdoin*, 22 Pick. 401; *Kabley v. Worcester Gas Light Co.*, 102 Mass. 392.

A provision “that no rent is to be charged” itself tends to show a letting. *Fiske v. Framingham Mfg. Co.*, 14 Pick. 491.

But a vote of a town authorizing its selectmen to make a lease is not itself a lease. *Hingham v. Sprague*, 15 Pick. 102. *Cp. Ober v. Brooks*, 162 Mass. 102, 104.

<sup>13</sup> *Wells, J.*, in *McGrath v. Boston*, 103 Mass. 369.

<sup>14</sup> *Ames, J.*, in *Kabley v. Worcester Gas Light Co.*, 102 Mass. 392. *Cp. Hinkley v. Guyon*, 172 Mass. 412.

<sup>15</sup> *Shaw, C. J.*, in *Dutton v. Gerrish*, 9 Cush. 89, 93.

that A. B. "agrees with C. D., that said C. D. shall have the right to occupy" is not apt to create a present tenancy.<sup>16</sup>

If the lessee refuses to accept a lease differing from the one agreed upon, but without objecting to the matters of variance, he waives the strict performance of the contract.<sup>17</sup>

§ 12. Form of agreement for a lease.—Even an agreement for a lease, being an interest in land, must be in writing.<sup>18</sup> A memorandum "to let, lease, and give possession of" certain premises at a date named, and for a certain sum, is not a suffi-

<sup>16</sup> *Weld v. Traip*, 14 Gray, 333.

A contract of sale under seal, contained the following provisions: "Said premises are to be conveyed within three months from this date by a good and sufficient warranty deed of said D., conveying a good and clear title to the same, free from all encumbrances, . . . and for such deed and conveyance said T. is to pay the sum of \$1200, . . . and in the meantime full possession of the premises, free of all tenants, is to be delivered to said T. at the time of the delivery of this writing . . . said T. to pay interest on said consideration to said D. till delivery of said deed." It was held these provisions did not amount to a lease. *Dunham v. Townsend*, 110 Mass. 440.

An agreement was made between a lessee under a written lease, and his lessor, by which the lease was to be terminated upon a certain day. Three months before its date of expiration, all subleases were assigned to the lessor, and the lessee was made agent of the lessor, to have charge and care of the premises for a period ending a year after the original lease would have expired, and was to furnish heat, light, etc., to the sublessees, collect rents and make repairs. The court said, per Soule, J.: "The only change wrought by the agreement for the three months was that G. [the lessee] was released from the duty to pay the taxes, and from the duty to make outside repairs as called for by the lease. But he continued in the same complete occupancy and control of the premises as before. The agreement amounted practically, though not technically, to a lease to G. for three months, of that part of the property not let to tenants, and of the reversion of that part which was let." The court, therefore, held the lessee liable to a third person who was injured by an unguarded coal hole on the premises. *Stewart v. Putnam*, 127 Mass. 403.

<sup>17</sup> *Freeland v. Ritz*, 154 Mass. 257.

<sup>18</sup> G. L., c. 259, § 1, cl. 4. *McMullen v. Riley*, 6 Gray, 500; *Bacon v. Parker*, 137 Mass. 309; *Mathews v. Carlton*, 189 Mass. 285; *White v. Wieland*, 109 Mass. 291; *Buffington v. McNally*, 192 Mass. 203. See *Hastings v. Weber*, 142 Mass. 232; *Emery v. Boston Terminal Co.*, 178 Mass. 183; *Bogigian v. Booklovers Library*, 193 Mass. 444; *Mentzer v. Hudson Savings Bank*, 197 Mass. 325, 331; *Flanagan v. Welch*, 220 Mass. 186, 189. See *Miles v. Janvrin*, 200 Mass. 514, 517.

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cient memorandum under this rule. And parol evidence is not competent to show that such an agreement was intended to be a contract to assign, instead of to give a lease of the premises.<sup>19</sup>

It is no objection to the written contract that some of its terms are to be fixed by something done in the future, if the things are done before action brought, and the contract is then filled in; as, for example, where a sublease is to be made as soon as the building is ready for occupancy and a lease thereof delivered, and such sublease is to be subject in all respects to the agreement and lease.<sup>20</sup>

But a letter which contains all the terms of an oral contract to take a lease, except the furnishing of a guarantor of rent, is not a sufficient memorandum of the whole contract to satisfy the statute.<sup>21</sup>

Where a person has been induced to make expenditures upon land, to construct improvements thereon or to change his situation materially in reliance upon the performance of the oral agreement and in expectation of the rights to be acquired thereby, refusal to carry out the agreement is not merely deprivation of the rights it was intended to confer, which alone is within the statute of frauds, but is in addition an infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.<sup>22</sup>

An unsigned lease, complete except for the signatures handed by the agent of the landlord to the tenant is not a memorandum under the statute, where it appears that some of the terms had

<sup>19</sup> *Gardner v. Hazelton*, 121 Mass. 494.

In England, it is immaterial that at the time of making the contract neither party has any interest in the property to which it relates. *Horsev v. Graham*, L. R., 5 C. P. 9.

One who has failed to perform an agreement to take a lease cannot set up a local usage requiring the lessor to clean a house before the lessee enters, unless the custom is known to the lessor. *Sawtelle v. Drew*, 122 Mass. 228.

<sup>20</sup> *Freeland v. Ritz*, 154 Mass. 257. *Cp.* *May v. Ward*, 134 Mass. 127; *Ashcroft v. Butterworth*, 136 Mass. 511.

<sup>21</sup> *Bogigian v. Booklovers Library*, 193 Mass. 444.

<sup>22</sup> *People's Express v. Quinn*, 235 Mass. 156, 159. See also *Davis v. Downer*, 210 Mass. 573, 576; *Williams v. Carty*, 205 Mass. 396; *Banaghan v. Malaney*, 200 Mass. 46; *Fenner v. Blake*, [1900] 1 Q. B. 426.



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not even been discussed. It was intended to be a contract, and was never used as such.<sup>23</sup>

So, when a leasehold is not to be created until the leases are signed and exchanged, if the lessor withdraws before the lessee has signed and returned one copy, the lessee cannot have specific performance of the agreement.<sup>24</sup>

§ 12a. **Damages for failure to carry out agreement.**—The measure of damages for failure to give a lease as agreed is the difference between the actual value of the leasehold estate that should have been enjoyed and the agreed rental that should have been paid therefor;<sup>25</sup> and the value of the leasehold means the value for any and all uses to which the property is adapted and can readily be adapted,<sup>26</sup> including prospective profits from the use of the land.<sup>27</sup>

If, however, the prospective tenant enters into occupation under an oral agreement for a lease, he becomes a tenant by virtue of G. L., c. 183, § 3, and the terms of the oral agreement become binding on both parties.<sup>28</sup>

§ 13. **Distinction between a lease and a license.**—As to this matter, see *supra*, § 4.

§ 14. **Lease when a mortgage.**—When a lease for years recites the receipt by the lessor of a gross sum as rent for the term in advance, and the lessee covenants to reconvey on payment of said sum and interest, the lease is a mortgage, and the fact that it is executed only by the lessor is immaterial, if the lessee has accepted it and taken possession under it.<sup>29</sup>

§ 15. **Term may commence at a future time.**—It is a familiar principle of law that a lease may create a term to commence at a future time, while a deed cannot do so. Therefore if the language in a given instrument is “demises and leases,” the payment of rent to begin at a future day, and nothing appears to show that anything further is to be done, the instrument is a present lease of a term to begin in the

<sup>23</sup> *Mentzer v. Hudson Savings Bank*, 197 Mass. 325, 331.

<sup>24</sup> *Diebold Safe & Lock Co. v. Morse*, 226 Mass. 342.

<sup>25</sup> *Neal v. Jefferson*, 212 Mass. 517, 522.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Neal v. Jefferson*, 212 Mass. 517, 523.

<sup>28</sup> *Flanagan v. Welch*, 220 Mass. 186, 189. See *Miles v. Janvrin*, 200 Mass. 514, 517.

<sup>29</sup> *Nugent v. Riley*, 1 Met. 117. Cf. *Martin v. Tobin*, 123 Mass. 87.

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future, and not an agreement for a lease.<sup>30</sup> On the same principle, where a lease provides that, if no notice of termination is given a certain time before the end of the term, the lease shall continue for a further period, this is not a provision for renewal, but a present demise for the longer term subject to the contingency of such notice being given.<sup>31</sup> So also when a second lease is delivered and accepted before the expiration of the first, the tenant's first estate is prolonged.<sup>32</sup>

But an agreement by A, that B, his tenant, shall have the right to occupy for a term to commence thirty days after A's death, and that A will make suitable provision for the carrying out of this agreement in his will, does not prolong the tenant's first estate.<sup>33</sup>

<sup>30</sup> *Weed v. Crocker*, 13 Gray, 219; *Eastman v. Perkins*, 111 Mass. 30; *Lowell Meeting House v. Hilton*, 11 Gray, 407.

An additional provision for an increase of rent as soon as certain improvements are made will not alter the nature of the instrument. *Weed v. Crocker*, 13 Gray, 219. Nor will a provision that no rent is to be claimed until the lessee is in actual possession of the premises. *Pratt v. Farrar*, 10 Allen, 519.

In *Shaw v. Farnsworth*, 108 Mass. 357, B proposed to A to take a lease of a house from a day future, provided a new furnace was put in. A replied that the proposal was accepted, and the furnace was put in before the day set for the beginning of the term. It was held that this was a present demise, though A had stamped his reply with a revenue stamp appropriate to an agreement, but not to a lease.

But an agreement "to let to B" on certain conditions and at a certain rent, and providing that "I am to do all outside repairs, and at present to fence the yard, repair the cellar, and lay a water pipe, etc.; and I will make a lease, etc., of the premises for three, with a privilege of five years from date," is not a present lease. *McGrath v. Boston*, 103 Mass. 369.

<sup>31</sup> *Kimball v. Cross*, 136 Mass. 300; *Dix v. Atkins*, 130 Mass. 171. *Cp.* *Kramer v. Cook*, 7 Gray, 550; *Toupin v. Peabody*, 162 Mass. 473. See also *infra*, §§ 88-90.

The mere staying in possession is sufficient evidence of an election to continue the tenancy, without further notice. *Kramer v. Cook*, 7 Gray, 550; *Kimball v. Cross*, 136 Mass. 300.

<sup>32</sup> *Cobb v. Boston*, 109 Mass. 438. *Cp.* Termination of Lease by Eminent Domain, *infra*, §§ 138-140.

<sup>33</sup> *Weld v. Traip*, 14 Gray, 330; *Cummings v. Hackett*, 98 Mass. 51. See also *O'Brien v. Ball*, 119 Mass. 28, where lands were taken by eminent domain, but the lessee continued paying rent to the original lessor. It was held this warranted a finding that no new tenancy was created. *Cp.* *Delano v. Montague*, 4 Cush. 42.

§ 16. **Delivery and entry.**—A lease is effective to vest the estate demised only from delivery,<sup>34</sup> and if in a lease no time be named for the commencement of a term the date of the delivery is what fixes such commencement.<sup>35</sup> The interest of the lessee before entry is called *interesse termini*, which is the right to possession in the future under the lease. This right is assignable, but does not qualify the lessee to maintain any action which presupposes possession, like trespass. Until entry the lessee cannot maintain these actions, even though the date fixed for the beginning of the term is past.<sup>36</sup> The interest is also subject to disposal by will, and in the absence of testamentary disposition vests in the executor.<sup>37</sup>

A delivery of a lease by the lessor conditional upon the acceptance by the lessee, and the latter's signing and returning one copy to the lessor, has no effect in the absence of such acts on the part of the lessee;<sup>38</sup> and the lessor is at liberty to withdraw his offer.<sup>39</sup> Nor does the incompleted lease have the effect of a deed-poll binding the lessor;<sup>40</sup> and the fact that the lessee, though making a counter proposal which was not accepted, secretly signed a copy of the lease is immaterial.<sup>41</sup> Nor does the facts that after the lessor has notified the lessee of the withdrawal of his offer, the lessee sends to the lessor a copy of the lease signed by him, together with a check for rent under it, and the lessor deposits the check and notifies the lessee that he has credited it to the lessee on his account as a tenant at sufferance, operate to make the lease binding.<sup>42</sup>

§ 17. **Statute provisions.—Leasehold as real estate.**—If a lease be made for a term of one hundred years or more, any one holding as lessee or assignee under such a lease shall, so long as fifty years of the term are unexpired, be regarded as having an estate in fee for all purposes.<sup>43</sup>

<sup>34</sup> *Browning v. Haskell*, 22 Pick. 310. *Cp. O'Malley v. Grady*, 222 Mass. 202.

<sup>35</sup> Co. Lit. 46b. *Lowell Meeting House v. Hilton*, 11 Gray, 407.

<sup>36</sup> *Brewer v. Stevens*, 13 Allen, 346, 350.

<sup>37</sup> Co. Lit. 46b. *Cp. Martin v. Tobin*, 123 Mass. 85.

<sup>38</sup> *Henchey v. Rathbun*, 224 Mass. 209.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Henchey v. Rathbun*, 224 Mass. 209, 212.

<sup>42</sup> *Henchey v. Rathbun*, 224 Mass. 209.

<sup>43</sup> G. L., c. 186, § 1; R. L., c. 129, § 1; Pub. St., c. 121, § 1; St. 1824, c. 162, §§ 1, 2. Cited in *Freedman v. Bloomberg*, 225 Mass. 493.

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This provision does not, however, give the lessee a fee nor deprive the lessor of his reversion;<sup>44</sup> and, if the lessee convey with words of inheritance and a covenant of seisin in leasehold, this does not work a disseisin of the lessor.<sup>45</sup>

At common law a lease, even for nine hundred and ninety-nine years or less, required no words of limitation to heirs and assigns, and needed not to run to executors and administrators.<sup>46</sup> And the same rule holds under the statute.<sup>47</sup> When dower, or an estate in lieu of dower, is assigned out of land so leased, the widow and her assignee must pay the owner of the unexpired term, in case of dower, one-third, and in case of an estate in lieu of dower, one-half of the rent reserved in the lease under which her husband held the term.<sup>48</sup>

§ 18. As to writing.—Leases must be made in writing, otherwise they create only an estate at will.<sup>49</sup> "Parol leases are not void; they regulate the terms of payment of rent and

<sup>44</sup> *Stark v. Mansfield*, 178 Mass. 76.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ex parte Gay*, 5 Mass. 419; *Chapman v. Gray*, 15 Mass. 439, 445.

<sup>47</sup> *Hollenbeck v. McDonald*, 112 Mass. 247. *Cp.* *Greenwood v. Murdock*, 9 Gray, 20. As to the use of "assigns" see *infra*, § 55.

<sup>48</sup> G. L., c. 186, § 2; R. L., c. 129, § 2; Pub. St., c. 121, § 2. *Reed v. Whitney*, 7 Gray, 533.

<sup>49</sup> G. L., c. 183, § 3; R. L., c. 127, § 3; Pub. St., c. 120, § 3; Gen. St., c. 89, § 2; Rev. St., c. 59, § 29; St. 1783, c. 37, § 1. Cited in *Haven v. Adams*, 4 Allen, 80, 93; *Kiernan v. Linnehan*, 151 Mass. 545; *Winter v. Stevens*, 9 Allen, 526; *Walker v. Sharpe*, 103 Mass. 154; *Sprague v. Quinn*, 108 Mass. 554; *Boynton v. Bodwell*, 113 Mass. 531; *Lothrop v. Thayer*, 138 Mass. 473; *Hollis v. Pool*, 3 Met. 350; *Kelly v. Waite*, 12 Met. 300; *Gleason v. Gleason*, 8 Cush. 32; *Dakin v. Allen*, 8 Cush. 34; *Furlong v. Leary*, 8 Cush. 409; *Elliott v. Stone*, 12 Cush. 176; s. c., 1 Gray, 571; *Currier v. Barker*, 2 Gray, 226; *Hutchins v. Byrnes*, 9 Gray, 367; *Curtis v. Galvin*, 1 Allen, 215; *Chandler v. Thurston*, 10 Pick. 205; *Ellis v. Paige*, 1 Pick. 43; *Ellis v. Paige*, 2 Pick. 71*n*; *Rising v. Stannard*, 17 Mass. 282; *Hingham v. Sprague*, 15 Pick. 102; *Emery v. Boston Terminal Co.*, 178 Mass. 172, 182; *Sheehan v. Fall River*, 187 Mass. 357; *Mathews v. Carlton*, 189 Mass. 285; *Flanagan v. Welch*, 220 Mass. 186, 189; *Freedman v. Gordon*, 220 Mass. 324; *Smith v. Abbott*, 221 Mass. 326; *Sargeant v. Leonardi*, 223 Mass. 556; *Scotti v. Bullock*, 225 Mass. 510; *St. Patrick's Religious &c. Assoc. v. Hale*, 227 Mass. 175; *Dana v. Treasurer & Receiver General*, 227 Mass. 562; *Podren v. Macquarrie*, 233 Mass. 127; *Conahan v. Fisher*, 233 Mass. 234; *Peoples Express, Inc. v. Quinn*, 235 Mass. 156. *Cp.* *White v. Maynard*, 111 Mass. 250. See also *infra*, § 155.

length of time for giving notice to quit, and are to some extent efficacious. If there be a parol lease for a year, by force of the statute, it can have no greater force than that of a tenancy at will, and therefore either party may terminate it in the mode prescribed by law, within the time limited by it. But, if neither party exercises that power, and it is allowed by both parties to extend through the year, it then expires by its own limitation, as if it had been a demise by specialty. It follows that in the ordinary cases, especially in cities, of letting tenements by parol for a fixed time, the lessor has no need to give his tenant notice to quit; if he does not quit at the expiration of the time thus limited by parol demise, the case is within the statute, and he may have the summary process to regain possession.”<sup>50</sup>

“The natural interpretation of the words of [G. L., c. 183, § 3] is that the writing required for the creation of an interest in land is more than a memorandum of the constituent act, that it is the act itself.”<sup>51</sup> Therefore, it seems a verbal lease cannot be rendered a valid lease for years retroactively, by a subsequent letter or other writing; but, at any rate, the memorandum has no effect against a stranger acquiring an independent title to the land before the memorandum was made.<sup>52</sup>

§ 18a. Parol modification of.<sup>53</sup>—A distinction should be made between an oral agreement which contradicts or modifies the terms of the lease, and an oral agreement on a collateral matter which does not do so.<sup>53a</sup> As to the former, it is not ad-

<sup>50</sup> Shaw, C. J., in *Elliott v. Stone*, 1 Gray, 571.

A verbal agreement to pay rent in advance at fixed periods is not a conditional limitation, *i. e.*, the landlord cannot maintain summary process without due notice. *Elliott v. Stone*, 12 Cush. 174; *Sprague v. Quinn*, 108 Mass. 554. But there may be an agreement that payment in advance shall be a condition precedent to the vesting of the estate for the period. *Elliott v. Stone*, 1 Gray, 571.

Whether an assignment must be in writing, see *Sanders v. Partridge*, 108 Mass. 556, and *infra*, §§ 43, 53.

The authority of an agent to make a lease or to accept a surrender of the same need not be in writing under this section. *Amory v. Kannofsky*, 117 Mass. 351, and see *infra*, §§ 134, 135.

<sup>51</sup> *Emery v. Boston Terminal Co.*, 178 Mass. 172, 183, per Holmes, C. J.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Cf.* §§ 12, 36, 37, 58, 241, 250, 255, and § 41a.

<sup>53a</sup> *Cf.* § 41a.

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missible to contradict or modify the written lease; and, if admitted, does not control it.<sup>54</sup>

Thus a tenant who seeks to recover rent paid in advance cannot show a verbal agreement that the rent should be refunded if the tenant failed to obtain a certain license;<sup>55</sup> nor can a tenant show a verbal agreement that there should be plenty of good water on the premises;<sup>56</sup> or that the lessor should build a veranda;<sup>57</sup> or that the lessor should keep a house safe and in repair during the tenancy;<sup>58</sup> or, where the lessor has a right to cancel the lease, that the lessee should have the right to occupy for a certain period.<sup>59</sup>

A custom follows the same rule as a parol agreement, and cannot be used to modify an unambiguous lease.<sup>60</sup>

§ 19. *As to recording.*—If the lease be for more than seven years it should be recorded in the district or county where the land lies, otherwise it is valid only as against the lessor, or his heirs and assigns, and persons having actual notice of it.<sup>61</sup>

<sup>54</sup> *O'Malley v. Grady*, 222 Mass. 202. *Cp.* *Cawley v. Jean*, 218 Mass. 263. But see *infra*, § 250.

<sup>55</sup> *O'Malley v. Grady*, 222 Mass. 202.

<sup>56</sup> *Brigham v. Rogers*, 17 Mass. 571.

<sup>57</sup> *Spear v. Hardon*, 215 Mass. 89.

<sup>58</sup> *Mills v. Swanton*, 222 Mass. 557.

<sup>59</sup> *De Friest v. Bradley*, 192 Mass. 346.

<sup>60</sup> *Follins v. Dill*, 229 Mass. 321, 325. *Cf.* *Sawtelle v. Drew*, 122 Mass. 228.

<sup>61</sup> G. L., c. 183, § 4; R. L., c. 127, § 4; Pub. St., c. 120, § 4. *Jones v. Parker*, 163 Mass. 564; *Anthony v. N. Y., P. & B. R. R.*, 162 Mass. 61; *Cunningham v. Pattee*, 99 Mass. 248; *Toupin v. Peabody*, 162 Mass. 473; *Collins v. Pratt*, 181 Mass. 345; *Leominster Gaslight Co. v. Hillery*, 197 Mass. 267; *Wenz v. Pastene*, 209 Mass. 359; *Philadelphia, etc., Iron Co. v. Boston*, 211 Mass. 526, 631; *Edwards v. Columbia Amusement Co.*, 215 Mass. 125; *Potter v. Aiden Lair Farms Assoc.*, 225 Mass. 99; *Freedman v. Bloomberg*, 225 Mass. 493; *Winnisimmet Trust, Inc. v. Libby*, 232 Mass. 491; *Piantadori v. Nally*, 233 Mass. 158; *Brewster v. Weston*, 235 Mass. 14.

"Actual notice" under this section does not require sight of the lease. "Intelligible information of a fact, either verbally or in writing, and coming from a source which a party ought to give heed to, is generally considered as notice of it, except in cases where particular forms are necessary." *George v. Kent*, 7 Allen, 16, 18, per Chapman, J.; *Curtis v. Mundy*, 3 Met. 405 (cases of deeds); *Philadelphia, etc., Iron Co. v. Boston*, 211 Mass. 526. *Cp.* *Leominster Gaslight Co. v. Hillery*, 197 Mass. 267, where it was left undecided whether one who knew of a lease, and had

In order to be recorded it must be acknowledged by one or more of the parties to it.<sup>62</sup>

"Any extension, or second term, or agreement for renewal which will carry the possession of the lessee to more than seven years from the making of the instrument," is within the meaning of the statute.<sup>63</sup> A lease should also be recorded

it in his possession for some time, was chargeable with notice of a covenant of renewal in it.

"One who purchases an estate knowing it to be in the possession of a tenant, is bound to inquire into the nature of the tenant's interest, and will be affected with notice of the extent thereof. . . . The general rule is that notice sufficient to make inquiry a duty is notice of all that by reasonable inquiry would have been ascertained." Foster, J., in *Cunningham v. Pattee*, 99 Mass. 248.

In *Wenz v. Pastene*, 209 Mass. 359, it was held that where a purchaser of the fee, after making a partial payment for the land, discovered an unrecorded lease, and then completed the payment, he was not an innocent purchaser and held subject to the lease, and could not claim any reimbursement from the lessee.

An assignment of a ten years' lease by the assignee in insolvency of the lessee is valid against such lessee, though not recorded. *Bemis v. Wilder*, 100 Mass. 446.

When an assignee of a lease accepts and enters under it he is liable on the covenants therein, whether the assignment has been recorded or not. *Mason v. Smith*, 131 Mass. 510. *Cp. Ripley v. Cross*, 111 Mass. 41, and § 10, *supra*. Similarly where it lacks a seal. *Sanders v. Partridge*, 108 Mass. 556, 559.

If a lease be recorded before a trial involving the tenancy is finished, or perhaps even before judgment rendered, and there is no intervening record of title, the statute is satisfied; and if the practice as to deeds, viz., that a deed must be recorded to be admissible in evidence, is to be applied to leases, a recording during the arguments is sufficient. *Anthony v. N. Y., P. & B. R. R.*, 162 Mass. 61; *Philadelphia, etc., Iron Co. v. Boston*, 211 Mass. 526, 531 (record during trial).

<sup>62</sup> G. L., c. 183, § 29. As to the subject of acknowledgment or proof, see *Hall on Examination of Land Titles*, pp. 48-63.

<sup>63</sup> As a lease for five years, with the privilege of renewal upon the same terms for a further period of five years. *Toupin v. Peabody*, 162 Mass. 473; *Leominster Gaslight Co. v. Hillery*, 197 Mass. 267.

Whether a present demise for seven years or less, providing for a second lease, or for the lessee's continuing in occupation beyond seven years, if not recorded, is wholly void as to a bona fide purchaser, without actual notice, or whether it is good for the first seven years *quære*. *Toupin v. Peabody*, 162 Mass. 473.



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where, although for less than seven years, the end of the term is more than seven years from the making.<sup>64</sup>

"The record of a . . . lease . . . duly acknowledged or proved as hereinafter provided, and purporting to affect the title to land, shall be conclusive evidence of the delivery of such instrument, in favor of purchasers for value without notice, claiming thereunder."<sup>65</sup>

An unrecorded lease may, however, be used in evidence on the question whether a person in possession of real estate is a lessee or an agent of the owner.<sup>66</sup>

A lease for less than seven years from the making thereof is valid against bona fide purchasers without actual notice.<sup>67</sup> A like exemption from the operation of the recording acts necessarily attaches to that incorporeal interest in real estate denominated rent when severed from the reversion to which it is an incident. A similar rule is applied to existing unrecorded easements.<sup>68</sup>

§ 20. **Effect of non-compliance with statute.**—When a lease does not comply with the statute requirements of the state where the land lies, yet the lessee has entered and enjoyed the premises without being evicted, he is liable under the lease and cannot set up the want of compliance with the statute<sup>69</sup> nor a want of power in the lessor to make such a lease due to non-compliance with other statutes.<sup>70</sup>

§ 21. **As to registered land.**—Leases of registered land for a term of seven years or more must be registered, in lieu of recording, and a lessee's duplicate certificate may be issued to the lessee upon his request.<sup>71</sup> The holder of a registered title is not protected by his certificate against the encumbrance of a lease for less than seven years which may be sub-

<sup>64</sup> Chapman v. Gray, 15 Mass. 439.

<sup>65</sup> G. L., c. 183, § 5; R. L., c. 127, § 5; St. 1892, c. 256.

<sup>66</sup> Potter v. Aiden Lair Farms Assoc., 225 Mass. 97.

<sup>67</sup> Winnisimmet Trust v. Libby, 232 Mass. 491, 492.

<sup>68</sup> Ibid.; Shaughnessy v. Leary, 162 Mass. 108, 112.

<sup>69</sup> Ripley v. Cross, 111 Mass. 41. Cp. Mason v. Smith, 131 Mass. 510, cited *supra*, and *supra*, §§ 10, 19.

<sup>70</sup> Ripley v. Cross, 111 Mass. 41. Cp. Hunt v. Thompson, 2 Allen, 341, 343.

<sup>71</sup> G. L., c. 185, § 71; R. L., c. 128, § 63; St. 1898, c. 562, § 64. This statute was held constitutional in Tyler v. Court of Registration, 175 Mass. 71.



sisting, inasmuch as such leases are not dealt with by the act.<sup>72</sup>

“If a petition is made subject to . . . a recorded lease for a term exceeding seven years, or if registration is to be made subject to such a . . . lease executed after the time of the petition and before the date of the transcription of the decree, the petitioner, before a decree of registration is entered, shall, if required by the court, file a certified copy of such . . . lease, and shall cause the original, or, in the discretion of the court, a certified copy thereof, to be presented for registration.”<sup>73</sup>

He must likewise allege in his petition any existing tenancy constituting an encumbrance upon the land.<sup>74</sup>

An owner of registered land may lease the same as fully as if it had not been registered. He may use forms of leases or other voluntary instruments like those now in use and sufficient in law for the purpose intended. But no voluntary instrument, except a will and a lease for a term not exceeding seven years, purporting to convey or affect registered land, shall take effect as a conveyance or bind the land, but shall operate only as a contract between the parties, and as evidence of authority to the recorder or assistant recorder to make registration. The act of registration shall be the operative act to convey or affect the land, and in all cases under this act the registration shall be made in the office of the assistant recorder for the district or districts where the land lies.<sup>75</sup>

§ 22. Parties to leases.—Agents.—Where a lease is made to “A. treasurer of the Eagle Lodge, etc.,” and is signed “A. Treas.,” it is binding upon him personally.<sup>76</sup> When A hires premises by a written lease of B at a certain rate, the facts that B is the agent of A for the purpose of selling A’s goods, and was a member of a firm of which he hired rooms for the showing of A’s goods, and that B turns the proceeds of his

<sup>72</sup> G. L., c. 185, § 46; R. L., c. 128, § 38; St. 1898, c. 562, § 39; St. 1899, c. 131, § 7.

<sup>73</sup> G. L., c. 185, § 30; R. L., c. 128, § 26; St. 1900, c. 354, § 4; St. 1898, c. 562, § 27.

<sup>74</sup> G. L., c. 185, § 30; R. L., c. 128, § 20; St. 1898, c. 562, § 21.

<sup>75</sup> G. L., c. 185, § 58; R. L., c. 128, § 50; St. 1898, c. 562, § 50.

<sup>76</sup> *Seaver v. Coburn*, 10 Cush. 324. See *Haley v. Boston Belting Co.*, 140 Mass. 73, and *infra*, § 24.

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agency for A into the firm's business, do not entitle the firm to proceed against A for use and occupation.<sup>77</sup>

The fact that, in an agreement or contract, a party is called an agent instead of a lessee, is not enough to do away with the legal result of the stipulations of the agreement.<sup>78</sup>

If an agent makes a lease during the absence of his principal and without due authority, the principal may terminate such lease on his return.<sup>78a</sup>

But the repudiation must be prompt as soon as the principal learns of the transaction.<sup>79</sup>

The bringing of an action by a lessor against a lessee for a breach of the contract to pay rent is a ratification of the execution of the lease although the person who executed was without authority.<sup>80</sup>

The agent's authority to lease will not be implied from the fact that he is left in charge of the property with authority to "make it pay the best way he could."<sup>81</sup> But when an agent makes a lease beneficial to his principal, although in excess of his authority, ratification will be presumed from slight circumstances;<sup>82</sup> and permitting a lessee to occupy and receiving rent from him is such ratification.<sup>83</sup> The authority of an agent to make a lease in the name of his principal, i. e., to make a sealed instrument, must be under seal,<sup>84</sup> although as we shall see<sup>85</sup> a written lease executed without authority may be ratified by parol.<sup>85a</sup>

<sup>77</sup> *Sage v. Lippincott*, 170 Mass. 278.

<sup>78</sup> *Stewart v. Putnam*, 127 Mass. 403, 407; *Buffington v. McNally*, 192 Mass. 198. Where a lease is signed as agent, either the undisclosed principal or the agent may sue on it; therefore an agent, even though describing himself as such in his writ, is not entitled in an action on the lease to give evidence of an undisclosed principal. *Buffington v. McNally*, 192 Mass. 198,

<sup>78a</sup> *Antoni v. Belknap*, 102 Mass. 193; *Albiani v. Evening Traveller Co.*, 220 Mass. 20, 25.

<sup>79</sup> *Albiani v. Evening Traveller Co.*, 220 Mass. 20, 25.

<sup>80</sup> *Gross v. Cohen*, 236 Mass. 468.

<sup>81</sup> *Antoni v. Belknap*, 102 Mass. 193.

<sup>82</sup> *Albiani v. Evening Traveller Co.*, 220 Mass. 20, 25.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Banorgee v. Hovey*, 5 Mass. 40; *Mechem on Agency*, 1st ed., § 93; 1 *Parsons on Contracts*, 9th ed., 46.

<sup>85</sup> *Infra*, § 28.

<sup>85a</sup> *Kostopolos v. Pessetti*, 207 Mass. 277. See also, *supra*, § 22; *infra*, § 57.

§ 23. Aliens.—Aliens may give or take leases of real estate like citizens.<sup>86</sup>

§ 23a. Commonwealth.—The state, acting through a duly authorized board, may lease land owned by it.<sup>87</sup>

§ 24. Corporations.<sup>87a</sup>—The directors of a corporation “may delegate authority to a committee of their own number, to alienate or [lease] real estate,” and “an authority to convey necessarily implies an authority to execute suitable and proper instruments for that purpose; and in case of a corporation to affix the corporate seal to an instrument requiring it.”<sup>88</sup>

When duly authorized agents of a corporation execute a lease running to the corporation in their own names, intending to take such lease on behalf of the corporation, and the latter ratifies their action, it is a valid lease to the corporation.<sup>89</sup> But, if the agent takes the lease intending that the corporation shall occupy under him, and this is known to the lessor, the fact that the corporation so enters and occupies does not make it liable, and the agent alone is the lessee, even though the corporation pays rent bills and collects rent from subtenants.<sup>90</sup> Yet though a lease to a corporation be signed only by an individual in his own name, with nothing to indicate in what capacity or on whose behalf he signed it, if the company enters and occupies under the lease it becomes liable to perform the covenants therein.<sup>91</sup>

Where an agent of a corporation has power to make an oral lease but not a written one, and does make the latter, and the corporation has received the rent, it must disaffirm the lease as soon as it learns the facts, or ratification will be presumed.<sup>92</sup>

<sup>86</sup> See G. L., c. 184, § 1; R. L., c. 134, § 1; Pub. St., c. 126, § 1; Gen. St., c. 90, § 38; St. 1852, cc. 29, 86. *Lumb v. Jenkins*, 100 Mass. 527.

<sup>87</sup> *Boston Fish Market Corp. v. Boston*, 224 Mass. 31.

<sup>87a</sup> See also *Municipal Corporations*, *infra*, § 30a.

<sup>88</sup> *Burrill v. Nahant Bank*, 2 Met. 163, 167, per Shaw, C. J. As to corporation leases, see *Hall on Mass. Business Corporations*, 3d ed., § 4, 2c-2g.

<sup>89</sup> *Carroll v. St. John's Society*, 125 Mass. 565.

That a lease “runs to persons who are directors of the corporation is a suspicious circumstance which calls for careful scrutiny, but of itself alone it does not necessarily render the transaction void.” *Nye v. Storer*, 168 Mass. 53, per Allen, J.

<sup>90</sup> *Haley v. Boston Belting Co.*, 140 Mass. 73.

<sup>91</sup> *Clark v. Gordon*, 121 Mass. 330.

<sup>92</sup> *Albani v. Evening Traveller Co.*, 220 Mass. 20, 25. *Cf. supra*, under Agents, § 22.

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A corporation may lease property, lawfully held by it under its charter and not immediately needed for its own business;<sup>93</sup> and where a corporation has power to lease its real estate for profit, it is not limited to leases for the purposes authorized in its charter.<sup>94</sup>

Street railways have no power to lease their franchises unless under authority of charter or special act of the legislature;<sup>95</sup> and the fact that a lease of a street railway is made without proper sanction cannot be urged as a defence to liability for negligence.<sup>96</sup>

§ 25. **Executors and administrators.**—The executors and administrators of a lessor may lease his real estate or may occupy it themselves, provided it be done with the consent of the heirs, but not otherwise.<sup>97</sup> They may sue for breaches of covenant, whether occurring before or after the lessor's

<sup>93</sup> *Hollywood v. First Parish in Brockton*, 192 Mass. 269, 277; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 272; *Brown v. Winnisimmet Co.*, 11 Allen, 326; *Hendee v. Pinkerton*, 14 Allen, 381.

<sup>94</sup> *Nye v. Storer*, 168 Mass. 53.

<sup>95</sup> G. L., c. 161, § 62; R. L., c. 112, § 85; Pub. St., c. 113, § 56; St. 1871, c. 381; § 31; St. 1906, c. 463, III., § 51. *Richardson v. Sibley*, 11 Allen, 65; *Quested v. Newburyport Horse Railroad*, 127 Mass. 204; *Braslin v. Somerville Horse Railroad*, 145 Mass. 64; *Clemens Elec. Mfg. Co. v. Walton*, 173 Mass. 286, 298; *Middlesex Railroad v. Boston and Chelsea Railroad*, 115 Mass. 347; *Feital v. Middlesex Railroad*, 109 Mass. 398; *McCluer v. Manchester & Lawrence R. R. Co.*, 13 Gray, 124.

<sup>96</sup> *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; *McCluer v. Manchester & Lawrence R. R. Co.*, 13 Gray, 124; *Braslin v. Somerville Horse Railroad*, 145 Mass. 64; *Clemens Elec. Mfg. Co. v. Walton*, 173 Mass. 286, 298.

<sup>97</sup> *Stearns v. Stearns*, 1 Pick. 157; *Choate v. Arrington*, 116 Mass. 552; *Edwards v. Ela*, 5 Allen, 87, 90; *Almy v. Crapo*, 100 Mass. 218, 220; *Adams v. Palmer*, 6 Gray, 338.

If an executor or administrator occupies or uses an estate he must account for rents and profits. See G. L., c. 206, § 6; R. L., c. 150, § 5; Pub. St., c. 144, § 5; Gen. St., c. 98, § 8; Rev. St., c. 67, § 6; St. 1789, c. 11, § 2. *Palmer v. Palmer*, 13 Gray, 326; *Gibson v. Farley*, 16 Mass. 280; *Almy v. Crapo*, 100 Mass. 218; *Edwards v. Ela*, 5 Allen, 87, 90; *Dickson v. U. S.*, 125 Mass. 311, 316.

See *Adams v. Palmer*, 6 Gray, 338, as to waste by an administrator.

"This provision has always been construed as applying as well to rents received by the executor or administrator as to the use of real estate occupied by him in person." Gray, C. J., in *Brooks v. Jackson*, 125 Mass. 307, 310. See also *Newcomb v. Stebbins*, 9 Met. 540, 544; *Alden v. Stebbins*, 99 Mass. 616; *Towle v. Swasey*, 106 Mass. 100.

death, and are likewise liable for debts and obligations due from the deceased, to the extent of assets in their hands.<sup>98</sup>

If a lessee dies during the term, his executor or administrator is subject to the same liabilities under the lease as the lessee,<sup>99</sup> and is liable for breaches of covenant occurring both before and after the lessee's death.<sup>100</sup> A surrender of the term, however, which is accepted unconditionally by the lessor, ends all liability both of the lessee's estate and his representative.<sup>101</sup>

§ 26. Guardians.—Guardians or conservators may obtain by petition to the probate court the power to give a written lease of any real estate of their wards for a term of years, and the decree of the court fixes the term and rental.<sup>102</sup>

At common law, a parent has no power as natural guardian of his child to make a binding lease of the infant's real estate so as to bind the estate.<sup>103</sup> And the same is true of a guardian regularly appointed under the statute.<sup>104</sup> Guardians may, however, make leases, binding upon themselves and the lessees personally,<sup>105</sup> though, unless there is something in the lease to make it the guardian's personal contract, the rent due under such a lease will belong to the ward and may be attached for his debts.<sup>106</sup>

<sup>98</sup> 2 Taylor, Landl. & Ten., 9th ed., § 459.

<sup>99</sup> Bradford v. Patten, 108 Mass. 153; Johnson v. Stone, 215 Mass. 219; Squire v. Larned, 196 Mass. 134, 136.

<sup>100</sup> Greenleaf v. Allen, 127 Mass. 248 (rent); Hovey v. Newton, 11 Pick. 421 (quiet enjoyment).

<sup>101</sup> Deane v. Caldwell, 127 Mass. 242; Johnson v. Stone, 215 Mass. 219.

If the representative remains some time upon the premises selling goods and receiving rent from under tenants, he is personally liable for use and occupation. Inches v. Dickinson, 2 Allen, 71.

<sup>102</sup> G. L., c. 202, § 31; R. L., c. 146, § 29; St. 1894, c. 128.

<sup>103</sup> May v. Calder, 2 Mass. 55.

<sup>104</sup> Jones v. Brewer, 1 Pick. 314.

<sup>105</sup> Hicks v. Chapman, 10 Allen, 463.

<sup>106</sup> *Ibid.*

Chapman, J., thus stated the law in the above case, pp. 464, 465:

"Guardians are not, like executors, administrators or trustees, invested with a legal title to the property which is placed under their care; but they have a naked power not coupled with an interest. . . . Their power over the property entirely supersedes that of the ward, his capacity being taken away by statute and conferred upon the guardians. Manson v. Felton, 13 Pick. 206. They have the control and management of his

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So also the real estate of a ward is "in the hands of" his guardian, within the meaning of a statute authorizing such an estate to be taken to satisfy the debts of a corporation in which the guardian as such is a stockholder.<sup>107</sup>

§ 27. **Imperfect title, Persons having.**—When a lease is made in good faith by one having an imperfect title, or by one who has in general the power to make leases but whose power is limited in the actual circumstances of the case, the lease is valid as between the parties, and voidable by those whose rights the lease has infringed;<sup>108</sup> but where one has no right whatever to make any lease does so, the lease is invalid, and the lessee may yield up the premises to the owner without losing his remedy against the lessor under the covenants in the lease.<sup>109</sup>

§ 28. **Joint parties.**—When several own an estate together as tenants in common or joint tenants, and less than the whole number execute a lease of the whole estate, such lease is valid as between the parties,<sup>110</sup> and as to all other persons except the cotenants and persons claiming under them;<sup>111</sup> the same property. They may rent his real estate in their own names, so as to bind the lessee to them personally, and themselves personally to the lessee. On such a letting it follows from the principles above stated that they must sue and be sued in their own names; but they cannot in such a case be said to exercise a mere authority not coupled with an interest. They involve themselves in personal liabilities without necessity by making such a contract. As it must be a contract on which they and their executors or administrators must sue and be sued in case of their resignation or death, it tends to create embarrassment. For these reasons their lease of the ward's lands ought not to be construed as a personal contract so as to vest the property of the rents in them if it can fairly be construed as a contract which does not vest any interest in themselves."

<sup>107</sup> *Mansur v. Pratt*, 101 Mass. 60, 62.

<sup>108</sup> *Pennock v. Lyons*, 118 Mass. 92. *Cf. infra*, § 28.

<sup>109</sup> *King v. Bird*, 148 Mass. 572.

<sup>110</sup> *Tainter v. Cole*, 120 Mass. 162; *Grundy v. Martin*, 143 Mass. 279; *DeWitt v. Harvey*, 4 Gray, 486; *Cunningham v. Pattee*, 99 Mass. 248; *Rising v. Stannard*, 17 Mass. 282.

<sup>111</sup> *Grundy v. Martin*, 143 Mass. 279; *Tainter v. Cole*, 120 Mass. 162; *Cunningham v. Pattee*, 99 Mass. 248; *Curtiss v. Sheffield*, 213 Mass. 239, 244. See *Bergengren v. Aldrich*, 139 Mass. 259. *Cp. supra*, § 27.

"One tenant in common cannot grant by deed, nor can he demise by deed or by parol, anything more than his undivided interest in the estate unless he is authorized by his cotenants to grant or demise their interests also. . . . Each may lease his undivided part; and when all join in a

also holds true of a lease of a part of the estate in severalty.<sup>112</sup>

In accordance with the general principle of tenancy by estoppel,<sup>113</sup> if the title of a cotenant, entitled to disaffirm the lease because made without his assent, becomes vested in the one by whom it was executed, the newly acquired title will enure by estoppel for the benefit of the lessee;<sup>114</sup> and where there is no transfer of interest such a lease may be validated as to all parties by the subsequent assent of those who did not execute it.<sup>115</sup> Probably also all the joint owners of an estate may sue on a lease executed by only a portion of them, this being an affirmance of the tenancy.<sup>116</sup>

§ 28a. **Life tenants.**—Where one has conveyed his land to another reserving to himself a life estate, he may lease to a third person during his life.<sup>117</sup> Likewise, a devisee of a life interest with power to sell or mortgage may lease during his life, and such lease is good during its term even after his death.<sup>118</sup>

§ 29. **Married women.**—Under our statutes a married woman may manage and dispose of her real estate as if she were sole, "But no conveyance by a married woman of real estate shall [unless she is living apart from him for cause] extinguish or impair her husband's tenancy by the curtesy by statute or his right to curtesy existing on December thirty-first, nineteen hundred and one, in such property unless he joins in the conveyance or otherwise releases the same."<sup>119</sup> She may also "make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole,"<sup>120</sup> except that she

lease it operates as a distinct demise by each of his part." Metcalf, J., in *Dillon v. Brown*, 11 Gray, 179, 180. *Cp.* *Peck v. Fisher*, 7 Cush. 386 (deed).

<sup>112</sup> *DeWitt v. Harvey*, 4 Gray, 491; *Cunningham v. Pattee*, 99 Mass. 248.

<sup>113</sup> See *supra*, § 9.

<sup>114</sup> *Cunningham v. Pattee*, 99 Mass. 248. *Cp.* *Rising v. Stannard*, 17 Mass. 282; *Johnson v. Stevens*, 7 Cush. 431; *DeWitt v. Harvey*, 4 Gray, 491.

<sup>115</sup> See *Cofran v. Shepard*, 148 Mass. 582.

<sup>116</sup> *Codman v. Hall*, 9 Allen, 335. There is no doubt that a lessee under such a lease who enters and occupies with the assent of all the owners is liable for use and occupation. *Ibid.*

<sup>117</sup> *Gloyd v. Davis*, 214 Mass. 238.

<sup>118</sup> *Wolff v. O'Brien*, 231 Mass. 487.

<sup>119</sup> G. L., c. 209, § 1; R. L., c. 153, § 1; St. 1889, c. 204; Pub. St., c. 147, § 1; St. 1874, c. 184, § 1.

<sup>120</sup> G. L., c. 209, § 2.



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cannot make contracts with her husband. "Contracts made by a married woman, relative to her separate property, trade, business . . . shall not bind her husband nor render him or his property liable therefor," except where she is doing business on her separate account, and fails to file the certificate to that effect provided for by law.<sup>121</sup>

The result of these provisions is that a married woman can take or give a lease under seal, or make a contract for tenancy at will, which will render her liable to an action for rent or to an action for use and occupation, and her husband is not liable upon such contracts except as above stated. Any lease made by her is still subject to the husband's right of curtesy.<sup>122</sup> Further, as a husband and wife cannot enter into a partnership, if he attempts to sign a lease in the name of

<sup>121</sup> G. L., c. 209, §§ 9, 10; R. L., c. 153, §§ 2, 9, 10; Pub. St., c. 147, §§ 2, 10, 11.

<sup>122</sup> *Fiske v. McIntosh*, 101 Mass. 66 (case of parol lease). *Cf.* *Doyle v. American Fire Ins. Co.*, 181 Mass. 139, 142.

When a married woman has taken a lease upon her own credit, and for her own occupation, the fact that her husband, who lives out of the state, occasionally visits her, and contributes to the support of the family does not make him liable. *Fiske v. McIntosh*, 101 Mass. 66.

*Historical.* At common law the husband had a right to lease the real estate of his wife, or real estate which he and his wife held as tenants by the entirety. *Pray v. Stebbins*, 141 Mass. 219. *Cp.* *Pierce v. Chace*, 108 Mass. 254; *Wales v. Coffin*, 13 Allen, 213. St. 1885, c. 237, made husband and wife take estates granted to them as tenants in common, unless otherwise provided in the deed, to that extent abolishing tenancy by the entirety, and therefore, at the present day the ordinary rules as to letting by tenants in common usually apply. *Cf.* *Pease v. Whitman*, 182 Mass. 363; *Hoag v. Hoag*, 213 Mass. 50.

Under St. 1855, c. 304, §§ 3, 4 and 7, in effect June 4, 1855; St. 1857, c. 249, §§ 2, 3; and Gen. St., c. 108, § 3, a married woman could make a lease of her separate real estate without the assent of her husband, provided the lease was for less than one year. If the lease was for more than one year, it was altogether void unless the husband joined in it or assented in writing, or unless in certain cases the assent of a judge was obtained. *Melley v. Casey*, 99 Mass. 241. The assent of the husband was, however, sufficiently shown by his signing as attesting witness. *Child v. Sampson*, 117 Mass. 62. *Cp.* *Hills v. Bearse*, 9 Allen, 403; *Cormerais v. Wesselhoeft*, 114 Mass. 550. An accommodation debt contracted by a married woman could not at this time be enforced in equity against the rents of her separate estate unless made a charge by an express instrument. *Willard v. Eastham*, 15 Gray, 328. The present law was originated by St. 1874, c. 184, § 1.



such an alleged partnership, the husband binds only himself.<sup>123</sup>

§ 30. **Mortgagors and mortgagees.**—The powers of mortgagors and mortgagees to make leases and the effect of a mortgage upon a subsisting lease have been already considered.<sup>124</sup> One who wishes a longer tenure than the period of the mortgage should get both the mortgagor and the mortgagee to join in the lease.<sup>125</sup> A mortgagee who joins in a lease should have the covenants of the lessee run to himself, in order that his assignee may sue upon them, as the mortgagor is ordinarily not in possession and the covenants would be in gross if they ran to the mortgagor.<sup>126</sup>

§ 30a. **Municipal Corporations.**<sup>127</sup>—A municipality has the power to lease for profit real estate held for public purposes and not needed for such purposes.<sup>128</sup> In such a case it stands in the position and is subject to the same duties and liabilities as a private lessor.<sup>129</sup>

Where the mayor and council have no power to make a certain lease, the latter is absolutely void, and no action can be maintained on it; the lessor being chargeable with knowledge of the authority of the officers and agents of the municipal corporation.<sup>130</sup>

§ 31. **Partners.**—One partner cannot lease the estate of his copartners without previous authority or subsequent ratification.<sup>131</sup> If he attempts to demise the whole estate by a lease executed by himself alone, he demises only the undivided interest which he himself owns.<sup>132</sup>

<sup>123</sup> *Voss v. Sylvester*, 203 Mass. 233, 237.

<sup>124</sup> *Supra*, §§ 5-8.

<sup>125</sup> *Doe v. Adams*, 2 Cr. & J. 232.

<sup>126</sup> *Webb v. Russell*, 3 T. R. 393, 679.

<sup>127</sup> *Cp. ultra vires, infra*, §§ 253a, 270a.

<sup>128</sup> *Davis v. Rockport*, 213 Mass. 279 (vacant common land); *French v. Quincy*, 3 Allen, 9 (part of city hall); *Worden v. New Bedford*, 131 Mass. 23 (part of city hall). *Cp. Oliver v. Worcester*, 102 Mass. 489; *Little v. Holyoke*, 177 Mass. 114; *Davies v. Boston*, 190 Mass. 194.

<sup>129</sup> *Davis v. Rockport*, 213 Mass. 279, 283; *Worden v. New Bedford*, 131 Mass. 23, 24.

<sup>130</sup> *Commercial Wharf Co. v. Boston*, 208 Mass. 482.

<sup>131</sup> *Golding v. Brennan*, 183 Mass. 286. *Cp. Cady v. Shepherd*, 11 Pick. 400, 406.

<sup>132</sup> *Dillon v. Brown*, 11 Gray, 179. Metcalf, J., said: "Now partners, though they own real estate as partners, still own it as tenants in common,

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If one of two partners sign the names of both to a lease, and both enter, this amounts to a ratification by the other partner;<sup>133</sup> and, in a case where a lease was made to a partnership consisting of four persons, and was signed and sealed by only two of them, but the firm entered and occupied under it, it was held that a promise on the part of all would be implied to perform the covenants.<sup>134</sup> When a lease was executed by one of a pair of lessors, the opening of an account on the books of the firm and the collecting rent were held a ratification;<sup>135</sup> and the same result was reached when a lease was executed by a committee of a lessee society.<sup>136</sup> The mere fact that the signature to a lease purports to be that of a partnership, will not bind either a firm lessee or a firm lessor in the absence of facts constituting a ratification by the partners who do not sign;<sup>137</sup> and, on the other hand, if there be ratification, the fact that the firm name was signed and not the names of the individual partners, is immaterial.<sup>138</sup>

Although a lease be under seal, yet it may be ratified by parol by the partners who have not executed it.<sup>139</sup>

When a partnership makes an agreement in due form to take a lease, the lessor cannot object to the dissolution of

and must grant or demise it as other tenants in common must. Such estate, in this commonwealth, is not subject to the rules of law which govern the disposition of other partnership property, and which authorize one partner to bind the others by the use of the name of the firm. Hence a grant or demise of real estate owned by partners must be made by each and all of them. . . . Each may lease his undivided part; and when all join in a lease, it operates as a distinct demise by each of his part." *Cp. Parsons on Partnership*, 4th ed., § 277.

A subsequent authority validates the lease as to all. *Cofran v. Shepard*, 148 Mass. 582.

<sup>133</sup> *Holbrook v. Chamberlain*, 116 Mass. 155; *Golding v. Brennan*, 183 Mass. 286. See also *Kendall v. Carland*, 5 Cush. 74.

<sup>134</sup> *Burkhardt v. Yates*, 161 Mass. 594; *Golding v. Brennan*, 183 Mass. 286; *Codman v. Hall*, 9 Allen, 335; *Kabley v. Worcester Gaslight Co.*, 102 Mass. 392; *Clark v. Gordon*, 121 Mass. 330.

<sup>135</sup> *Golding v. Brennan*, 183 Mass. 286.

<sup>136</sup> *Carroll v. St. John's, etc., Society*, 125 Mass. 565, 566.

<sup>137</sup> *Golding v. Brennan*, 183 Mass. 286; *Cady v. Shepherd*, 11 Pick. 400, 406.

<sup>138</sup> *Golding v. Brennan*, 183 Mass. 286. *Cf. Dillon v. Brown*, 11 Gray, 179; *Butterfield v. Hemsley*, 12 Gray, 226.

<sup>139</sup> *Holbrook v. Chamberlain*, 116 Mass. 155, 161.

the firm before the lease is actually made, inasmuch as the former partners may still be joint lessees.<sup>140</sup>

§ 32. Trustees.—Trustees have the legal estate in land but hold subject to the equitable rights of their cestuis que trust. So long as a trustee follows his authority, a lessee is protected in taking a lease; but if the trustee has no power to make the lease, the lessee takes subject to the trust and is liable to suffer in his estate. The safest way for a lessee is, therefore, to have both the cestui and the trustee join in the lease and in the words of demise.<sup>141</sup> If a trustee exceeds his authority in making a lease it is still valid as between the parties, but is voidable by those entitled to a conveyance from the trustee.<sup>142</sup> Leases should be executed by all the trustees under a given trust, and separate leases by each trustee of his part are void.<sup>143</sup>

§ 33. Vendee.—Under an agreement for the sale of land wherein no time of performance is specified, and the purchaser is to have the use, profits and general rights in the estate, the purchaser has the right to lease the premises to another.<sup>144</sup>

§ 34. Illegality.—If a lease is made with the intention that the premises shall be used for an unlawful purpose, it is void, although it contain a covenant by the lessee to make no unlawful use of them;<sup>145</sup> and the assignment of such a lease has no effect to give it validity.<sup>146</sup> Although a lease be illegal because made without the necessary authority and in the face of a statutory prohibition, yet the lessee may be liable in certain cases by virtue of it. Thus a street railway company

<sup>140</sup> *Palmer v. Sawyer*, 114 Mass. 8.

If the owner of property leases it, agreeing to have part of the profits of a business to be carried on upon the premises, this does not make the parties partners. *Holmes v. Old Colony R. R. Co.*, 5 Gray, 58.

<sup>141</sup> *Taylor, Landl. & Ten.*, 9th ed., § 130. *Cp. supra*, § 30.

<sup>142</sup> *Pennock v. Lyons*, 118 Mass. 92 (where the cestui had died although the trustee was ignorant of the fact). This follows the general principle of excess of authority. See *supra*, § 28.

<sup>143</sup> *Chapin v. Chicopee Society*, 8 Gray, 580.

<sup>144</sup> *Fitch v. Windram*, 184 Mass. 68.

<sup>145</sup> *Sherman v. Wilder*, 106 Mass. 537.

Parol evidence of the intention with which the lease was made and of the actual use made of the premises is competent to avoid the lease. *Ibid.*

<sup>146</sup> *Sherman v. Wilder*, 106 Mass. 537. *Cp. infra*, §§ 128–132.

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is liable for negligence though it occupies under a lease made without authority.<sup>147</sup>

A lease or an agreement for use and occupation made on Sunday is void; but if the lessee subsequently occupies and enters he is liable for use and occupation.<sup>148</sup>

§ 35. **Fraud.**—A lease obtained by fraudulent representations as to a material matter is voidable upon discovery of the fraud;<sup>149</sup> but the right to rescind may be lost by acquiescence,<sup>150</sup> and if there is no rescission the tenant is liable for use and occupation less damages for the deceit.<sup>151</sup>

Where one has obtained a lease in fraud of a tenant at will to whom the lessee stood in a fiduciary capacity, he will be decreed to hold the lease on a constructive trust for the benefit of the former tenant.<sup>152</sup>

§ 36. **Uncertainty.**—If for any reason the terms of the lease are entirely indefinite, so that its meaning in an essential

<sup>147</sup> See *supra*, § 24.

<sup>148</sup> G. L., c. 136; R. L., c. 98; Pub. St., c. 98; Gen. St., c. 84; Rev. St., c. 50. *Stebbins v. Peck*, 8 Gray, 553; *Day v. McAllister*, 15 Gray, 433; *Cranson v. Goss*, 107 Mass. 439; *O'Brien v. Shea*, 208 Mass. 528.

<sup>149</sup> *Brooks v. Allen*, 146 Mass. 201; *Milliken v. Thorndike*, 103 Mass. 382. Colt, J., said, p. 385: "The defense goes to the original execution and validity of the lease containing the covenants to pay rent. If consent to it was obtained from the defendants by fraud, then it was not such real and free consent as gives it validity. The false statement by which it was procured must, indeed, be of some matter which is an essential element in the agreement, which goes to the substance of it, and upon which the consent was based. If it be of this material character, then there is no mutual assent to the contract, and the party deceived may rescind, provided he does it on discovery of the fraud, and returns to the other party everything of value which he has received under it. If the contract has been wholly executed on both sides, and the party injured cannot restore the other to his previous condition, the only remedy at law is by an action for deceit or by recoupment of damages. But the mere possession of property which was the subject matter of the contract will not take away the right of rescission, if possession is surrendered as soon as the fraud is discovered. These familiar rules are equally applicable, whether the contract relates to real or personal property." *Cp. infra*, § 119.

As to evidence of fraud, see *infra*, § 246.

<sup>150</sup> *Hall v. Ryder*, 152 Mass. 528. *Cp. Browning v. Haskell*, 22 Pick. 310; *O'Malley v. Grady*, 222 Mass. 202.

<sup>151</sup> *Infra*, §§ 269, 271.

<sup>152</sup> *H. C. Girard Co. v. Lamoureux*, 227 Mass. 277.

particular, such as the parties or estate granted, cannot be ascertained, the lease will be void.

The uncertainty of language may in some cases be explained by extrinsic evidence. Thus, for example, the circumstances of occupation at the time the lease was made may throw light on the subject-matter included;<sup>153</sup> and, in some cases, the construction put upon the lease by the parties themselves,<sup>154</sup> or the condition and situation of what is granted,<sup>155</sup> may be considered. But conversations in negotiations preliminary to the lease are not admissible.<sup>156</sup>

Even where there is uncertainty in the terms of a lease, a lessee who has occupied under it cannot, in an action for rent, set up that it is void.<sup>157</sup>

Uncertainty in the length of the term prevents a lease operating as such, but may create a tenancy at will.<sup>158</sup>

Where the terms of a lease are clear and certain, extrinsic evidence cannot be resorted to.<sup>159</sup>

§ 37. Subject-matter included.—For the purpose of determining the scope and effect of a lease, it is to be construed as to the date when it was made.<sup>160</sup> And when the parties have put a certain construction upon a lease, as to the subject-matter included, which construction is not repugnant to the lease or to any rule of law, they will be bound by it.<sup>161</sup>

A lease of certain premises gives no rights outside of those premises “except such as were plainly intended by the parties to be included in the leased premises as appurtenant thereto or parcel thereof, either because they were really necessary to the beneficial enjoyment of the demised property for the purpose for which it was leased, or because it was manifest from the condition and situation of the property and the

<sup>153</sup> *Appleton v. O'Donnell*, 173 Mass. 398. *Cp. supra*, § 11.

<sup>154</sup> *Wood v. Edison, etc., Co.*, 184 Mass. 523, 529; *Arafe v. Howe*, 228 Mass. 47.

<sup>155</sup> *Brande v. Grace*, 154 Mass. 210, 212; *Salisbury v. Andrews*, 19 Pick. 250, 255.

<sup>156</sup> *Wentworth v. Manhattan Market Co.*, 216 Mass. 374, 377.

<sup>157</sup> *Appleton v. O'Donnell*, 173 Mass. 398.

<sup>158</sup> See *infra*, § 41.

<sup>159</sup> *Perry v. Mott Iron Works Co.*, 207 Mass. 501, 506. *Cp. supra*, § 18a.

<sup>160</sup> *Goldsmith v. Traveller Shoe Co.*, 221 Mass. 482.

<sup>161</sup> *Arafe v. Howe*, 228 Mass. 47.

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attendant circumstances that they had been designed and appropriated for the benefit of that property.”<sup>162</sup>

And, a mere expectation of a tenant that certain rights are to be included in his lease, not induced by the lessor or even known to him, gives the lessee no rights he can enforce.<sup>163</sup>

A lease of a building passes the land on which it stands, although the latter be not mentioned,<sup>164</sup> and also the land adjacent thereto so far as reasonably necessary to its use.<sup>165</sup> But “a case may be taken out of this general rule if the lease or other grant shows that it was the intention of the parties that the building only, or a room in it, should pass, and not the land.”<sup>166</sup>

A lease of an entire building includes the gutters and water conductors affixed to it.<sup>167</sup> So, a lease of an entire building with the land under the same covers the front, back and side walls and therefore includes the whole height of a party wall on the land demised, even though such wall is carried up above the roof of the rented building.<sup>168</sup> And therefore the lessor cannot compel either the lessee or the adjoining owner to close window openings placed in the wall above the lessee’s building with the lessee’s consent.<sup>169</sup> Nor, where the adjoining

<sup>162</sup> *Raynes v. Stevens*, 219 Mass. 556, 557, per Sheldon, J. Cf. *Pevey v. Skinner*, 116 Mass. 129; *Lowell v. Strahan*, 145 Mass. 1, 8.

<sup>163</sup> *Raynes v. Stevens*, 219 Mass. 556, 558; *Brighton Packing Co. v. Butchers’, etc., Assoc.*, 211 Mass. 398, 405.

<sup>164</sup> *Bacon v. Bowdoin*, 22 Pick. 401; *Hooper v. Farnsworth*, 128 Mass. 487; *Rogers v. Snow*, 118 Mass. 118, 124; *Lowell v. Strahan*, 145 Mass. 1, 9; *Crabtree v. Miller*, 194 Mass. 123, 126. Cf. *Forbush v. Lombard*, 13 Met. 109, 114; *Allen v. Scott*, 21 Pick. 25.

Land under the extreme limits of the house, *e. g.*, the eaves, passes, so far as the lessor has title thereto. *Sherman v. Williams*, 113 Mass. 481. Cf. *Millett v. Fowle*, 8 Cush. 150; *Carbrey v. Willis*, 7 Allen, 364 (cases of deeds).

<sup>165</sup> *Forbush v. Lombard*, 13 Met. 114. The same rule would apply to exceptions in a lease.

<sup>166</sup> *Rogers v. Snow*, 118 Mass. 124; *Shawmut Bank v. Boston*, 118 Mass. 125; *Searle v. Bishop of Springfield*, 203 Mass. 493.

In *Crabtree v. Miller*, 194 Mass. 123, 126, a court was appurtenant to two buildings one of which was reserved, and it was held the lessee was entitled only to the use of the court as appurtenant to his building.

<sup>167</sup> *Coman v. Alles*, 198 Mass. 99, 102.

<sup>168</sup> *Torrey v. Parker*, 220 Mass. 520. Cf. *Lowell v. Strahan*, 145 Mass. 1.

<sup>169</sup> *Torrey v. Parker*, 220 Mass. 520.

owner makes alterations in the wall at the request of the lessee, is the latter estopped to deny the lessor's right of control of the wall above the lessee's building.<sup>170</sup>

A lease of part of a building includes the outside of the front wall of that part, and consequently gives the right to place signs thereon;<sup>171</sup> but, where different floors of a building are let to different tenants, a lease of part, even of the basement, carries no estate in the land under the building.<sup>172</sup> In such a case the right of each lessee to use the common stairway is in the nature of an easement appurtenant to the leased premises, but the stairway is not included in the lease.<sup>173</sup>

The words "first floor" are equivalent to "first story," and include the walls as well as the flooring of the story above; but "room" excludes the outside of lateral walls, at least when they constitute the walls of another room. "First floor in building" shows that the section is of the whole building and not of a part of it.<sup>174</sup>

A lease of "the third floor with the exception of the staircases and the elevators wells . . . this is a lease of floor space only" does not leave the control of elevator gates in the tenant.<sup>175</sup> A lease of "part of the third story and attic over the same" in a certain building, may perhaps be explained by the circumstances of occupation at the time the lease was made, but in any case if the lessee has occupied and paid rent under the lease he cannot defend an action for rent on the ground that

<sup>170</sup> *Torrey v. Parker*, 220 Mass. 520.

<sup>171</sup> *Lowell v. Strahan*, 145 Mass. 1. *Cf.* *Pevey v. Skinner*, 116 Mass. 129.

<sup>172</sup> *Stockwell v. Hunter*, 11 Met. 448; *Shawmut Bank v. Boston*, 118 Mass. 125.

In *Shawmut Bank v. Boston*, 118 Mass. 125, which was a lease of rooms in a building, Morton, J., said, p. 129: "In cases where different rooms in the same building are leased to separate tenants, the situation of the property and the nature of the tenures excludes the idea that each tenant takes an estate for years in the land. Such estates existing at the same time in different tenants are inconsistent and impossible. And there is no reason for holding that the tenant first in order of time takes an estate for years to the exclusion of the others, for, from the nature of the case, each of the tenants and the lessor understand that the other leases of a similar tenure are to be given."

<sup>173</sup> *Tremont Theatre Amusement Co. v. Bruno*, 225 Mass. 461. *Cf.* *Flanagan v. Welch*, 220 Mass. 186, 191.

<sup>174</sup> *Lowell v. Strahan*, 145 Mass. 1, 8.

<sup>175</sup> *Follins v. Dill*, 221 Mass. 93, 98. *Cf.* *Galvin v. Beals*, 187 Mass. 250.



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the lease is void for uncertainty.<sup>176</sup> A lease of a roof for bill posting does not cover the party wall.<sup>177</sup>

A lease of a store and basement includes the cellar under the sidewalk;<sup>178</sup> but a lease of a basement, to which there is access by a flight of steps from the street, does not carry with it a right to use a freight elevator for hoisting goods to the sidewalk, in the absence of evidence that it was intended to be so used.<sup>179</sup> A lease of a room on the first floor and the cellar under it gives no rights outside of those spaces.<sup>180</sup>

A lease of premises described as a garage, in which the lessee agrees to pay for all gas, electricity and water used "in conducting said garage," and not to sublet for garage purposes to a certain corporation, does not restrict the right of the lessee to use the premises for any lawful purpose.<sup>181</sup>

If the premises demised are described by a number on a certain street, ordinarily only those rooms accessible from such street will be included, even though owing to alterations certain floors run into an adjoining building. The rooms on floors not so connected are not included.<sup>182</sup> If the premises

<sup>176</sup> *Appleton v. O'Donnell*, 173 Mass. 398.

<sup>177</sup> *Yorra v. Lynch*, 226 Mass. 153.

<sup>178</sup> *Boston v. Gray*, 144 Mass. 53; *Arafe v. Howe*, 228 Mass. 47.

<sup>179</sup> *Cummings v. Perry*, 169 Mass. 150. Field, C. J., said, p. 155: "It is true that when a person hires a room in a building, a right to use the apparent means of access and exit often passes as appurtenant to the premises hired. In modern buildings of great height this doctrine we assume may be applied to elevators. Whether an active duty to maintain an elevator for the use of tenants can be implied may be open to question, but if an elevator is in fact maintained by the landlord, the duty to permit tenants to use it, we assume may be implied, if this is reasonably necessary for the beneficial occupation of the rooms let, and if from the construction of the elevator and of the passageways it is apparent that the elevator was intended for the use of the tenants." s. c. 177 Mass. 407.

<sup>180</sup> *Raynes v. Stevens*, 219 Mass. 556.

<sup>181</sup> *Barnett v. Clark*, 225 Mass. 185.

<sup>182</sup> *Houghton v. Moore*, 141 Mass. 437.

And *a fortiori*, a building separated by a thick partition wall with no openings in it, will not be included in a lease of the adjoining building. *Durr v. Chase*, 161 Mass. 40.

For the purpose of showing what building recently erected is covered by a lease, oral evidence is admissible to show where, at the execution of the lease, the streets were, and what buildings had recently been erected by the lessor. But evidence that the agent of the lessor knew for what purpose the lessee proposed to use the premises is not admissible. *Ibid.*



bound on a passageway the title to which is in the lessor, the lease includes the land to the middle of the passageway.<sup>183</sup> A passageway leading to the rear of a building may be expressly excepted from the demise of the building, but in such a case the lessees have an easement in the passageway in common with all other persons entitled to use the same.<sup>184</sup>

§ 37a. Implied Grants.—In general, any right of way or other easement necessary to the enjoyment of the demised premises passes as appurtenant thereto, although not expressly mentioned in the lease.<sup>185</sup>

“The instrument is to be construed as far as possible beneficially for the lessee, so as to enable him to use the premises for the purposes intended.”<sup>186</sup> “And in order to determine

<sup>183</sup> *Hooper v. Farnsworth*, 128 Mass. 487. *Cp.* as to grants, *Boston v. Richardson*, 13 Allen, 146, 154.

<sup>184</sup> *McNeil v. Kendall*, 128 Mass. 245, 249. *Cp.* *Forbush v. Lombard*, 13 Met. 114; *Crabtree v. Miller*, 194 Mass. 123, 126.

But where a yard and outbuildings are equally contiguous to two buildings, one of which is leased, such lease does not carry the yard and outbuildings. *Oliver v. Dickinson*, 100 Mass. 114.

The following is a form for a reservation of passageways from a lease:

“The passageways around the said buildings are reserved by the lessors, who hereby lease only the right of such use thereof as may be necessary for the enjoyment of the buildings aforesaid.” *McDonough v. Gilman*, 3 Allen, 264.

<sup>185</sup> *Oliver v. Dickinson*, 100 Mass. 114; *Hooper v. Farnsworth*, 128 Mass. 487; *Brande v. Grace*, 154 Mass. 210; *Case v. Minot*, 158 Mass. 577; *Cummings v. Perry*, 169 Mass. 150; *Crabtree v. Miller*, 194 Mass. 123.

<sup>186</sup> *Shaw, C. J.*, in *Dexter v. Manley*, 4 Cush. 25.

“This court has held the doctrine of implied grants with a good deal of strictness.” *Field, C. J.*, in *Cummings v. Perry*, 169 Mass. 150.

Compare in case of deeds, *Salisbury v. Andrews*, 19 Pick. 250; *Thayer v. Payne*, 2 Cush. 327, 331; *Pettingill v. Porter*, 8 Allen, 1, 6, 7; *White v. Chapin*, 12 Allen, 516, 518; *Parker v. Bennett*, 11 Allen, 388; *Nichols v. Luce*, 24 Pick. 103; *Brigham v. Smith*, 4 Gray, 297; *Leonard v. Leonard*, 2 Allen, 543; *Gayetty v. Bethune*, 14 Mass. 55; *Oliver v. Pitman*, 98 Mass. 46, 50; *Buss v. Dyer*, 125 Mass. 287; *Johnson v. Knapp*, 146 Mass. 70; *s. c.*, 150 Mass. 267; *Carbrey v. Willis*, 7 Allen, 364; *Brown v. Thissell*, 6 Cush. 254.

“The grant of anything carries an implication, that the grantee shall have all that is necessary to the enjoyment of the grant, so far as the grantor has power to give it.” *Salisbury v. Andrews*, 19 Pick. 250, 255, *per Shaw, C. J.* *Cp.* as to deeds, *Keats v. Hugo*, 115 Mass. 204, citing many cases. Also see *infra*, §§ 186, 198.

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what is thus granted by implication, the existing circumstances, and the actual condition and situation of that which is granted may be looked at." <sup>187</sup>

Thus an open space necessary to give light and air to the lessees and needed in their business passes. "It is true that the doctrine of implied grants or easements in connection with real estate is applied with some strictness in this commonwealth; but in this case it might be well found, as it was found, that the right to light and air was necessary to the beneficial enjoyment of the demised premises. The open space was not accessible from the street. Its sole use, so far as the lessors were concerned, was for the benefit of the occupants of their building, and it must have been intended that the plaintiffs should have the benefit of it." <sup>188</sup>

So one who had leased a basement and a store which had a side window opening on the common vestibule and staircase, the right to use which for displaying goods was valuable, was held entitled to have the window unobstructed as against the other tenants, he and the lessor having contemplated such use at the time the lease was made. <sup>189</sup>

So also if one leases certain floors with a right to use a hoistway in common with the tenant of the floor below, the lessee is entitled to the floor-space of the hoistway for storage purposes when not in use for hoisting purposes. <sup>190</sup>

So a lease of certain rooms in a building carries with it a right in the nature of an easement to use the common stairway. <sup>191</sup> But the ordinary rule that the one having an easement is bound to keep the property subject to it in

<sup>187</sup> *Brande v. Grace*, 154 Mass. 210, 212, per Allen, J.; *Salisbury v. Andrews*, 19 Pick. 250, 255.

Therefore, where it is intended to except from a lease any portion of premises which previously have been used or occupied as one estate, such reservations should be clearly stated. Where one gave a lease of "all that farm and outlands now occupied by the lessor but lately occupied by T," it was held the whole estate passed, although at the time of the lease the lessor occupied a lot which had not been occupied by T. *Jewett v. Steer*, 6 Cush. 99.

<sup>188</sup> *Case v. Minot*, 158 Mass. 577, per Allen, J.

<sup>189</sup> *Whitehouse v. Aiken*, 190 Mass. 468.

<sup>190</sup> *Kent v. Todd*, 144 Mass. 478.

<sup>191</sup> *Tremont Theatre Amusement Co. v. Bruno*, 225 Mass. 461.

sufficient repair for the exercise of his rights does not apply.<sup>192</sup>

The right which is the subject of an implied grant need not be indispensable; but it must be a real necessity, although perhaps only a reasonable one. A mere balance of convenience is not enough. And the burden is upon the lessee to show the necessity.<sup>193</sup>

Thus, when a wharf was leased, described by metes and bounds, "being the same premises now in the occupancy of B. A., together with all the rights, privileges and appurtenances to said wharf, and to the flats thereto belonging or in any ways appertaining," it was held that the recital as to occupancy referred only to the wharf, and that the lessee could not object to the filling up of part of the adjoining dock.<sup>194</sup>

And where a jeweler leased one room on the first floor of a building with the cellar under that room, both having windows opening on a rear court furnishing access from another street, and the light and air being advantageous but not necessary to the lessee, it was held he could not restrain the lessor from extending the second floor of the building over the court.<sup>195</sup>

Where a lessor agrees with the lessee of the first floor of a building to "supply light, heat, elevator service and space," the word "space" is too indefinite to convey the right to use any part of the cellar.<sup>196</sup>

§ 37b. **Adverse possession.**—"If one person disseises another of land, and while in possession leases the land to a tenant who continues to occupy it under his lease, the adverse possession of the tenant may be tacked to that of the landlord, and the possession of the tenant may be said to be that of the landlord; but if the landlord never had possession of the land, nor claimed title to it, and did not include it in the lease, the possession of the tenant beyond the boundaries of the land contained in the lease is not the possession of the landlord, even although the tenant believes that he is occupying only the land demised.<sup>197</sup> The occupation of a tenant for the

<sup>192</sup> Tremont Theatre Amusement Co. v. Bruno, 225 Mass. 461; Flanagan v. Welch, 220 Mass. 186; Prescott v. White, 21 Pick. 341; Miller v. Hancock, [1893] 2 Q. B. 177.

<sup>193</sup> Raynes v. Stevens, 219 Mass. 556, 558.

<sup>194</sup> Davis v. Atkins, 9 Cush. 13.

<sup>195</sup> Raynes v. Stevens, 219 Mass. 556.

<sup>196</sup> Goldsmith v. Traveller Shoe Co., 221 Mass. 482.

<sup>197</sup> Melvin v. Proprietors of Locks and Canals, 5 Met. 15. Field, J.

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purpose of adverse possession by his landlord extends to all the premises described in the lease if the tenant has possession of any part.<sup>198</sup>

§ 37c. What cannot be leased.—The right of a widow to have dower assigned to her being “a personal right which, until dower is assigned by the act of law or by the act of the party bound to assign it, gives no estate,” cannot be the subject of a lease.<sup>199</sup>

It is provided by statute that the franchise and road of a street railway company cannot be leased unless under the authority of its charter or a special act of the legislature.<sup>200</sup>

§ 38. Reservations.—A reservation which completely defeats the lease will be held void;<sup>201</sup> and where an easement incidental to a lease is expressed to be for a particular purpose, the lessee cannot use it for a different purpose, although the latter imposes no greater burden upon the lessor's estate, and is properly incidental to the lessee's business.<sup>202</sup> Thus, if property is leased with a right “to have the improvement of all the homestead land,” this includes the right to use it only for the purpose for which, in connection with the occupation of the whole estate, it was prepared, set apart and exclusively appropriated.<sup>203</sup> Provisions in a lease allowing the lessee to repair the demised parts of a building, and providing that the landlord shall repair the other parts of the building so that the demised premises may be fit for occupation, do not show any intention on the part of the lessor to grant any interest in the land.<sup>204</sup>

in *Holmes v. Turner's Falls Co.*, 150 Mass. 535. *Cp. Murphy v. Commonwealth*, 187 Mass. 361.

<sup>198</sup> *Murphy v. Commonwealth*, 187 Mass. 361.

<sup>199</sup> *Croade v. Ingraham*, 13 Pick. 33.

<sup>200</sup> See *supra*, § 24.

<sup>201</sup> *Pynchon v. Stearns*, 11 Met. 312 (right to erect any buildings on the land without molestation); *Dexter v. Manley*, 4 Cush. 14, 25 (water power for saws).

<sup>202</sup> *Sibley v. Hoar*, 4 Gray, 222 (where lessee entitled to water power for a fan bellows and used it for other purposes). See *Biglow v. Battle*, 15 Mass. 313.

<sup>203</sup> *Richardson v. Richardson*, 9 Gray, 213.

<sup>204</sup> *Shawmut Bank v. Boston*, 118 Mass. 125, Morton, J., said, p. 130: “It is to be noted that the lessee is not to rebuild the whole building; it is ‘to repair the demised premises and to restore the same to their condition before such casualty,’ and the lessor covenants ‘to make such repairs and

It sometimes happens that the estate originally demised is diminished during the term by a sale of part under a provision in the lease; such a provision is perfectly valid.<sup>205</sup>

Where it is intended to except portions of premises which have previously been used or occupied as one estate, the reservations should be clearly stated, so that the portions excepted may not pass under the doctrine of implied grants.<sup>206</sup>

If a tenant attempt to grant by lease a greater estate than he possesses, the grantee takes all that the tenant can lawfully convey.<sup>207</sup>

§ 39. **Water power.**<sup>208</sup>—Where water power is leased for a particular purpose, it cannot be used for other purposes, even though the latter impose no greater burden upon the estate and are properly incidental to the lessee's business.<sup>209</sup>

On the other hand, where there was a lease of so much power as the lessee might want, except when the water should not be sufficient to carry the lessor's mill and a cotton factory of not more than five thousand spindles, it was held that the lessor was entitled at all times to power for that number of spindles,<sup>210</sup> and might apply it to any use he pleased.

Where the lessor demised premises for a pail factory and reserved one room with the privilege of using a saw and lathe, and

restorations to the other parts of said building as shall be necessary to render the demised premises fit for occupation.' This imports that the lessor is to have control and dominion over the land, to enable him to lay the foundations and build those parts of the building not included in the demised premises, and is inconsistent with an intention to give the lessee the exclusive possession which the grant of an estate for years involves. Suppose the lessor, after the destruction of the building refuses to rebuild or to permit the lessees to rebuild, can the latter maintain a possessory action for the land? If so what are the rights of other tenants who may hold under similar tenures? . . . These considerations show that there is an inherent difficulty arising from the nature and relations of the property which is the subject of the lease, in deciding that in cases like that at bar the lessee takes by implication an estate for years in the land itself."

<sup>205</sup> *Shaw v. Appleton*, 161 Mass. 313. *Cp. infra*, §§ 92-94.

<sup>206</sup> See *supra*, § 37.

<sup>207</sup> *Infra*, § 43.

<sup>208</sup> See also *infra*, § 111. As to Steam Power, see *infra*, § 107.

<sup>209</sup> *Sibley v. Hoar*, 4 Gray, 222 (lease for a fan bellows, use for other foundry purposes).

<sup>210</sup> *Biglow v. Battle*, 15 Mass. 313.

set up three saws, which interfered with the lessee's business by making the power unsteady, although the lessor used but one at a time, it was *held*: (1) That the reservation must be so construed as to enable the lessee to carry on his factory; (2) that evidence of the mode in which the water power reserved had been previously used was admissible to show a reasonable limitation of the right reserved, and that it was a question of fact whether the saw used by the lessor required more power than was included in the reservation; (3) that the damages were not to be estimated by the amount of the rent or of the lessee's profits, but according to the value of the lease; (4) that on the question of damages, the lessee might prove the condition and capacity of his works and the cost and price of his product; (5) that the testimony of a manufacturer in another place whose works and business were similar to those of the lessee was competent on these matters.<sup>211</sup>

A lease of an artificial pond "to be used for flowage purposes only . . . with the exclusive right to flow, store and use water in said pond" to a certain height, reserving the exclusive right to cut and sell ice gives the lessee no right to discharge hot water into the pond, whereby the ice is melted, although doing so may be a reasonable method of operating the lessee's steam plant.<sup>212</sup>

§ 40. **Personal property.**<sup>213</sup>—It often happens that a lease is made of premises used for farming or manufacturing, or of a house containing furniture, and the question then arises how far chattels therein become the property of the lessee. This question is to be determined upon consideration of the meaning of the whole contract.<sup>214</sup> The cases usually fall into three classes: (1) Where the lessee is to have the use of the property during the term and is to redeliver it, or property of the like kind and amount, to the lessor at the end of it. (2) Where the property is to pass to the lessee upon the performance of certain conditions precedent, and (3) somewhat similar to the above, where articles produced or manufactured upon the premises or the natural increase of live-stock, etc., are to become the property of the lessor in certain events. The

<sup>211</sup> *Dexter v. Manley*, 4 Cush. 14. *Cp.* *Gould v. Bugbee*, 6 Gray, 371.

<sup>212</sup> *Walker Ice Co. v. American Steel & Wire Co.*, 185 Mass. 463.

<sup>213</sup> *Cp. infra*, §§ 212–218.

<sup>214</sup> *Lewis v. Lyman*, 22 Pick. 437, 441.

fact that the subject-matter of the contract is not in existence when the lease is made is immaterial.<sup>215</sup>

(1) Where the lessee has the use of chattels for the term only, under a covenant to redeliver at the end of the term, he has only a special property in the chattels and has no right to dispose of them during the term.<sup>216</sup> In the case of live-stock, animals substituted for those which die during the term are held upon the same quasi-trust. In case the lessee wrongfully disposes of the chattels, his special right of property ceases forthwith, and the landlord may maintain an action of tort for them against either the tenant or his vendee, even before the expiration of the lease.<sup>217</sup> Somewhat similar to this is the case where the produce of the farm and the increase of live-stock furnished by the lessor are to be used and spent upon the farm. In such a case, the chattels cannot be attached as the property of the tenant; for, as soon as they come into existence, they are appropriated to a certain use.<sup>218</sup> Even of the increase of live-stock is ultimately to be divided between the lessor and the lessee, until a division the lessee has no separate property in any of it, under such a provision as the above.<sup>219</sup> A lease of a house containing furniture belonging to the lessee, who has purchased it from a prior tenant, gives

<sup>215</sup> *Lewis v. Lyman*, 22 Pick. 443; *Whitcomb v. Tower*, 12 Met. 487; *Heald v. Builders Ins. Co.*, 111 Mass. 38.

<sup>216</sup> *Billings v. Tucker*, 6 Gray, 368 (live-stock); *DeWolf v. Brown*, 15 Pick. 462 (farming tools and cattle); *Chamberlain v. Shaw*, 18 Pick. 278 (sheep).

In *Gray v. Central Mass. R. R. Co.*, 171 Mass. 116, it was held that a lease of all its railroad and property included the proceeds of a foreclosure sale of a bond mortgage.

<sup>217</sup> *Billings v. Tucker*, 6 Gray, 368. In this case the covenant was to take good care of the stock "and to faithfully return said stock in quantity and quality to the lessor, or the value of the same in money, as the lessee may elect; said property, if retained to be appraised by disinterested persons at the close of the contract."

<sup>218</sup> *Lewis v. Lyman*, 22 Pick. 437, 445; *Heald v. Builders Ins. Co.*, 111 Mass. 38; *DeWolf v. Brown*, 15 Pick. 462. A covenant "not to carry off hay" from a farm is not broken by a removal against the lessee's consent by an attaching creditor. *Smith v. Putnam*, 3 Pick. 221. See *Clapp v. Thomas*, 7 Allen, 188.

<sup>219</sup> *Lewis v. Lyman*, 22 Pick. 437, 445; *Chamberlain v. Shaw*, 18 Pick. 278; *Chandler v. Thurston*, 10 Pick. 205. As to sharing of crops see § 211, *infra*.



the lessee possession of the furniture as against creditors of the vendor if the lessee enter; but, if there be no entry, there is in effect no delivery of the chattels, and the prior tenant's creditors may seize them.<sup>220</sup>

(2) Where the property is to pass to the lessee upon the performance of certain conditions. In such a case the terms of the lease must be strictly complied with. Thus, where a lessee has an option at the end of the term either to return certain live-stock, or their value in money according to a stated method of appraisal, he cannot sell the stock prior to the end of the lease and the making of the appraisal.<sup>221</sup> So, when the annual produce is to be divided between the lessor and the lessee.<sup>222</sup>

(3) As we shall see elsewhere,<sup>223</sup> a tenant is ordinarily entitled to the annual crop which is the result of his labor upon land. This right, however, may be affected by special provisions in the lease. Thus the tenant may agree that a certain proportion of the produce of the land,<sup>224</sup> or the whole of certain of the produce shall belong to the lessor absolutely.<sup>225</sup> So it may be provided that produce, whether growing or harvested, shall be held for the rent and be at the disposal of the lessor, and that the lessor may enter and take the same for rent in arrear; this amounts in effect to a reservation of rent.<sup>226</sup> But, in this case, action by the lessor being necessary to transfer the title, before entry and delivery to the lessor title to the chattels is in the lessee, and they are liable to his creditors' rights.<sup>227</sup> So also, where the lessee agrees to manufacture

<sup>220</sup> *Shumway v. Rutter*, 7 Pick. 56.

<sup>221</sup> *Billings v. Tucker*, 6 Gray, 368.

<sup>222</sup> See (1) *supra*.

<sup>223</sup> *Infra*, §§ 209-211.

<sup>224</sup> *Dascomb v. Sartell*, 1 Allen, 281 (all hay, fodder, etc., and one-third of remaining produce to go to the lessor).

<sup>225</sup> *Ibid*.

<sup>226</sup> *Heald v. Builders Ins. Co.*, 111 Mass. 38, 40.

<sup>227</sup> *Butterfield v. Baker*, 5 Pick. 522.

So where the lessor was to have all the crops in case of the refusal of the lessee to pay the rent. *Munsell v. Carew*, 2 Cush. 50. In *Whitcomb v. Tower*, 12 Met. 487, the provision was as follows: "The wool now growing on the sheep, and the lambs, if any, which the sheep may have, I [lessor] shall claim to remain my property, until the worth of it and them is paid me toward the use of the place." It was held that the title to the wool and lambs vested immediately in the lessor without further



bricks, and the lessor is to have an option from time to time to take bricks at a fair market price instead of rent, until the lessor has exercised his election by taking, he has no property in them, and his right of election ceases at the death of the lessee.<sup>228</sup>

§ 41. Duration.<sup>229</sup>—If a lease contains no words indicating the duration of the term, it is ineffective and creates an estate at will only;<sup>230</sup> and parol evidence is inadmissible to give such a lease a different construction.<sup>231</sup> Thus, a term to begin “when said house is suitable to be occupied,” and to end whenever after two years the lessor should wish to move into the premises or part thereof, creates only a tenancy at will.<sup>232</sup> On the other hand, where the lease is obviously intended to be for a definite time, and the terminal date is obviously an error, being earlier than the date of the lease, parol evidence is admissible to explain the ambiguity.<sup>233</sup> Where the lease is for a definite period but no time is named for its commencement, the term begins to run on the delivery of the lease.<sup>234</sup>

In computing the duration of a lease, the day of its date and delivery are to be excluded, unless a different intention is manifested in the instrument.<sup>235</sup> So a lease for a term of action on his part, and that they could not be attached by a creditor of the lessee.

<sup>228</sup> *Ex parte Wait*, 7 Pick. 100.

<sup>229</sup> As to when the term under a lease may commence to run, see also *supra*, § 15.

<sup>230</sup> *Gardner v. Hazelton*, 121 Mass. 494; *Cheever v. Pearson*, 16 Pick. 266, 271.

<sup>231</sup> *Murray v. Cherrington*, 99 Mass. 229.

<sup>232</sup> *Ibid.* Whether a lease providing that the lessee shall “hold for the term of five — from the first day, etc., yielding and paying therefor the rent of fifty-five dollars per month” is valid, *quære*. *Weiss v. Levy*, 166 Mass. 290.

<sup>233</sup> *Buffington v. McNally*, 192 Mass. 198.

<sup>234</sup> Co. Lit. 46b; *Browning v. Haskell*, 22 Pick. 310. *Cp. supra*, § 16.

<sup>235</sup> *Bemis v. Leonard*, 118 Mass. 506.

The reason for the rule is that where the term is for a period “from” a given day, no moment of time can be said to be after a given day until that day has expired. Per Wilde, J., in *Bigelow v. Wilson*, 1 Pick. 485.

Thus where a lease provided that if any instalment of rent should remain unpaid for one month “from the time” when it should become due, the lessor might enter and take possession, it was held that the day on which the rent fell due must be excluded. *Sheets v. Selden*, 2 Wall. 177, 189.

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years "from the first day of July" begins on July second.<sup>236</sup> "The preposition 'until,' like 'from,' or 'between' generally excludes the day to which it relates. But such general rules of construction must yield to the intention of the parties apparent upon the face of the whole instrument as applied to the subject-matter."<sup>237</sup>

A lease for a certain period, though it be for less than a year, is technically a lease for years; as "for the season,"<sup>238</sup> or "for three months,"<sup>239</sup> or for the "life of the building."<sup>240</sup> In this last case, a destruction of the building such that a portion leased cannot be rebuilt without also rebuilding other portions not leased, is an ending of the "life of the building" within the meaning of the lease.<sup>241</sup>

The lease may contain within itself a provision for termination upon the happening of a certain event. Thus, an estate may be leased upon a condition subsequent and terminate on breach, as where the lessee is to enjoy the premises so long as he preserves a furnace and buildings on the land, including a reasonable time to rebuild in case of fire.<sup>242</sup> So, a clause providing that the lessor may diminish the estate demised by selling part of the same, is valid.<sup>243</sup>

Where there is a conditional limitation that if the lessor desires to sell he may terminate the lease on giving a certain notice and paying a certain sum, it is not necessary that he should have made a binding agreement to sell nor for him to make any entry.<sup>244</sup>

<sup>236</sup> *Atkins v. Sleeper*, 7 Allen, 487.

<sup>237</sup> Per Gray, C. J., in *Kendall v. Kingsley*, 120 Mass. 94.

In this case it was held that an assignment executed on Aug. 31 of "all rents due and coming to me until Oct. 1," where the tenant paid on the first of each month, included the rent due Oct. 1. Cp. *Atkins v. Boylston Insurance Co.*, 5 Met. 439.

<sup>238</sup> *Kelly v. Waite*, 12 Met. 300.

<sup>239</sup> *Casey v. King*, 98 Mass. 503. "Month" in a lease means calendar month. *Avery v. Pixley*, 4 Mass. 461.

<sup>240</sup> *Ainsworth v. Mt. Moriah Lodge*, 172 Mass. 257.

<sup>241</sup> *Ibid.*

<sup>242</sup> *Cook v. Bisbee*, 18 Pick. 527; *Knowles v. Hull*, 97 Mass. 206 (lessor's selling the property); *Flagg v. Dow*, 99 Mass. 18 (until value of buildings paid for).

<sup>243</sup> See *infra*, §§ 146, 149, 166, 171, and *Ashley v. Warner*, 11 Gray, 43; *Shaw v. Appleton*, 161 Mass. 313.

<sup>244</sup> *Gunsenhiser v. Binder*, 206 Mass. 434.

In general, no one can grant a lease for a longer period than the duration of the estate which he himself enjoys; but trustees, and those having a power, may make a lease for a longer period, subject to equitable restrictions.<sup>245</sup>

§ 41a. Collateral agreements.<sup>246</sup>—It sometimes happens that an oral agreement about something not covered by a lease is made at the same time as the execution of the lease. Where such an agreement is independent, a breach of it may be the foundation of a separate or cross action, but is no defense either at law or in equity to an action on the lease.<sup>247</sup> But where the oral agreement is not independent, but has been merged in the lease, no evidence can be given of it. Thus, an oral agreement made before a lease that there should be a sufficiency of good water on the demised premises was held to have been merged in the lease,<sup>248</sup> and the same was held where premises were to have been let for a certain rent, and on the lessor's oral agreement to build a veranda a higher rent was inserted in the lease.<sup>249</sup>

## SECTION II

### ASSIGNMENT OF LEASES; SUBLEASES

#### (a) BY LESSEE

§ 42. Definition.—Whenever a lessee passes to another his entire interest for his whole term, in the whole or a part of the estate, it is an assignment. But a transfer of less than the entire interest, or of the entire interest for less than the whole term, even though of the whole estate leased, amounts only to a sublease.<sup>250</sup> These principles apply to an underlease as well as to an original lease.<sup>251</sup>

<sup>245</sup> 1 Taylor, Landl. & Ten., 9th ed., § 83.

<sup>246</sup> Cf. *supra*, § 18a.

<sup>247</sup> Spear v. Hardon, 215 Mass. 89.

<sup>248</sup> Brigham v. Rogers, 17 Mass. 571.

<sup>249</sup> Spear v. Hardon, 215 Mass. 89. Cf. Mills v. Swanton, 222 Mass. 557.

<sup>250</sup> Patten v. Deshon, 1 Gray, 325; Shumway v. Collins, 6 Gray, 227; Sanders v. Partridge, 108 Mass. 556; McNeil v. Kendall, 128 Mass. 245, 248, 252; Dunlap v. Bullard, 131 Mass. 161; Hollywood v. First Parish in Brockton, 192 Mass. 269, 275.

The word "term" signifies not merely the time specified in the lease, but also the estate and interest that passes by the lease. 2 Bl. Com. 144.

A grant of the whole estate for the unexpired part of the term, but

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<sup>251</sup> Shumway v. Collins, 6 Gray, 227, 230.

The fact that the instrument in question is expressed to be an assignment or a sublease is immaterial in deciding its true nature;<sup>252</sup> for the substance and not the wording of the agreement is the determining factor.<sup>253</sup> Thus "even if the instrument may be in form a sublease yet if it conveys the whole estate it will operate as an assignment;"<sup>254</sup> and an agreement that a certain person was a sublessee of a part of certain land "for a time equal to the remainder of the term of the original lease" amounts to saying he was an assignee.<sup>255</sup>

Just as there may be an agreement for a lease, which is different from the lease, so there may be an agreement to assign or sublet, which is not a present assignment or sublease.<sup>256</sup>

All leases may be assigned or sublet at the pleasure of the lessee, in the absence of restraining covenants.<sup>257</sup> But an assignment can be valid only while the lease holds good, and therefore, where a subtenant assigns his sublease after the lessor has recovered possession, the assignment passes nothing.<sup>258</sup>

So, where there is a provision that the lessor may reënter upon bankruptcy of the lessee, if the latter becomes bankrupt where the lessee has a right of entry for breach of covenants by the assignee, is a sublease. *Dunlap v. Bullard*, 131 Mass. 161. Colt, J., said, p. 162: "The grant of an interest therefore which may possibly endure to the end of the term is not necessarily a grant of all the estate in the term. If by the terms of the conveyance, be it in the form of a lease or an assignment, new conditions with a right of entry, or new causes of forfeiture are created, then the tenant holds by different tenure, and a new leasehold interest arises, which cannot be treated as an assignment or a continuation of the original term." *Cp., contra*, 7 Am. Law Rev. 240, 247.

<sup>252</sup> *Dunlap v. Bullard*, 131 Mass. 161.

<sup>253</sup> *Hollywood v. First Parish in Brockton*, 192 Mass. 269.

<sup>254</sup> *McNeil v. Kendall*, 128 Mass. 245, 251; *Dunlap v. Bullard*, 131 Mass. 161; *Hicks v. Lord Downing*, 1 Ld. Ray. 99; *Field v. Mills*, 33 N. J. L. 254; *Woodhill v. Rosenthal*, 61 N. Y. 382; *Bedford v. Terhune*, 30 N. Y. 453. See also *Gear, Landl. & Ten.*, § 93. If a tenant "sublets" for a longer term than that under which he holds, it will be, as to the landlord, an assignment. *Stewart v. Long Island R. Co.*, 102 N. Y. 601.

<sup>255</sup> *Hollywood v. First Parish in Brockton*, 192 Mass. 269 (agreed facts).

<sup>256</sup> *Simonds v. Turner*, 120 Mass. 328 (contract to do certain work on the property and then reassign to the lessee held not a reassignment).

<sup>257</sup> *Patten v. Deshon*, 1 Gray, 325, 330. As to these covenants, and the question whether a covenant against assigning forbids under letting and vice versa, see *infra*, § 75.

<sup>258</sup> *Carter v. Russell*, 101 Mass. 53.

he cannot assign or be compelled to carry out an agreement to assign.<sup>259</sup> Where the original lease is executed to the tenant as an individual he cannot assign it as trustee.<sup>260</sup>

§ 43. Form.—“An estate or interest in land created without an instrument in writing signed by the grantor or by his attorney shall have the force and effect of an estate at will only, and no estate or interest in land shall be assigned, granted or surrendered unless by such writing or by operation of law.”<sup>261</sup>

The usual words of assignment by endorsement on the lease are as follows: “I, A. B., the lessee named in the within lease, hereby assign, transfer and set over to C. D., the within lease, the premises thereby demised, and all my right, title and interest therein and thereunder.”<sup>262</sup> It is usual for the assignee to covenant to pay all rent becoming due after the assignment, and to perform the covenants of the lease; the assent of the lessor to the assignment is often added. No particular words are necessary, however, to effect an assignment, if the meaning of the parties is clearly indicated.<sup>263</sup>

Inasmuch as leases are under seal, an assignment of a lease

<sup>259</sup> *Ellis v. Small*, 209 Mass. 147, *semble*. In this case there was also a provision against assigning without the lessor's consent.

<sup>260</sup> *Podren v. Macquarrie*, 233 Mass. 127.

<sup>261</sup> G. L., c. 183, § 3; R. L., c. 127, § 3; Pub. St., c. 120, § 3; Gen. St., c. 89, § 2; Rev. St., c. 59, § 29; St. 1783, c. 37, § 1. For general citations on this statute, see *supra*, § 18.

An omission to plead this statute, which omission is not objected to at the trial, can not be availed of on exceptions. *White v. Maynard*, 111 Mass. 250, 252.

In *Sarkisian v. Tule*, 201 Mass. 596, it was held that a lessee who sells his business as a whole including his leasehold estate must put the contract of sale in writing, under R. L., c. 74, § 1, cl. 4. (G. L., c. 259, § 1, cl. 4.)

A verbal agreement that a surrender of a lease shall operate as an assignment so that the lessor shall occupy the lessee's place as to sublessee is inoperative because of the statute. *Smith v. Abbott*, 221 Mass. 326.

<sup>262</sup> In *Peters v. Stone*, 193 Mass. 179, the assignment read: “We hereby assign, set over and transfer to — the within lease and all rights and benefits to be derived therefrom and subject to all the conditions and covenants by the lessees to be performed.”

<sup>263</sup> 2 Taylor, Landl. & Ten., 9th ed., § 428. But a written agreement of a third person to take his lease from the lessee, to pay rent to the landlord, and generally to take the place of the lessee is not a proper assignment. *Brewer v. Dyer*, 7 Cush. 337.

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must itself also be under seal,<sup>264</sup> although there may be an equitable assignment upon transfer of the instrument;<sup>265</sup> but a leasehold estate can be transferred by a writing in any appropriate form not under seal, so far as the statute is concerned,<sup>266</sup> and, as in other cases of the defective execution of instruments,<sup>267</sup> if the assignee accepts the assignment and enters under it, that is sufficient to make him liable according to its terms.<sup>268</sup>

An endorsement transferring "all our right, title and interest in and to the within lease," includes whatever leasehold estate the assignor has, and is sufficient to satisfy the statute of frauds.<sup>269</sup> If a tenant for years attempts to grant a greater estate than he possesses or can lawfully convey, this does not work a forfeiture of his estate, but passes to the

<sup>264</sup> *Wood v. Partridge*, 11 Mass. 488; *Dennis v. Twitchell*, 10 Met. 180; *Brewer v. Dyer*, 7 Cush. 337; *Bridgham v. Tileston*, 5 Allen, 371; *Winnisimmet Trust v. Libby*, 232 Mass. 491, 492. Cf. § 59.

<sup>265</sup> *Dennis v. Twitchell*, 10 Met. 180.

<sup>266</sup> "If therefore a leasehold estate can be transferred only by an assignment of the instrument by which it was created, this objection [want of a seal] must be held to be decisive. But we do not so understand the law. A lease by whatever form of instrument it is made conveys to the lessee an estate or interest in the land. He may in turn convey to another any subordinate interest or his entire estate in any appropriate form without regard to the form in which he acquired his own title. The leasehold estate may be transferred by devise; by sale on execution as a chattel; [by levy, G. L., c. 235, § 46]; or sale by an administrator as personal assets. . . . A seal is not essential to such transfer, even of a lease for more than seven years. No written instrument is necessary except to satisfy the statute of frauds. . . . So far as it affects the sufficiency of the writing under the statute of frauds, we do not see that it makes any difference that the instrument referred to is under seal while the transfer is not." *Sanders v. Partridge*, 108 Mass. 558, 559, per Wells, J.

In *Martin v. Tobin*, 123 Mass. 85, the assignee of a lessee who had acquired the fee in an undivided half of the leased premises made a mortgage of the same which recited the lease and provided that "said leased premises are included in said description and in this mortgage." Morton, J., said, p. 87: "This was a mortgage of real estate, and, we think, did not, therefore, operate as an assignment of the lease."

Use and occupation can be maintained against an assignee under such a transfer. *Sears v. Trowbridge*, 15 Gray, 184.

<sup>267</sup> *Cp.* §§ 10, 19, 20, 24, 27, 28, 31, 34-36.

<sup>268</sup> *Sanders v. Partridge*, 108 Mass. 556, 559.

<sup>269</sup> *Ibid.*

grantee all the estate which the tenant can lawfully convey.<sup>270</sup>

An assignment of a lease for more than seven years should be recorded in the district or county where the land lies.<sup>271</sup>

Query as to an assignment of a lease for five years with an option for five years more.<sup>272</sup> But such an assignment given as security for a debt is not a mortgage of personal property and hence does not need to be recorded, in order to be valid as to persons other than the parties to it, under the statutes as to mortgages.<sup>273</sup>

§ 44. Assignments by operation of law.—The assignment may take place by operation of law. Thus a purchaser at a sale on execution of a leasehold estate stands in the position of an assignee in law of such estate.<sup>274</sup> So also, a bequest of all the testator's interest in certain property of which he has a lease will operate as an assignment of the lease.<sup>275</sup> The term for years is personal property, and, therefore, will vest in the lessee's personal representatives,<sup>276</sup> unless there is such bequest; and a sale by them as personal assets of the estate operates as an assignment.<sup>277</sup> If the assignment is not by deed, there must be an actual entry by the tenant to charge him upon covenants running with the land;<sup>278</sup> but in case

<sup>270</sup> G. L., c. 184, § 9; R. L., c. 134, § 7; Pub. St., c. 126, § 7; Gen. St., c. 89, § 9; Rev. St., c. 59, § 6. *Hollenbeck v. McDonald*, 112 Mass. 250; *Stark v. Mansfield*, 178 Mass. 76.

<sup>271</sup> G. L., c. 183 § 4., *Collins v. Pratt*, 181 Mass. 345, 347. For citations on this statute, see *supra*, § 19.

<sup>272</sup> *Freedman v. Bloomberg*, 225 Mass. 491.

<sup>273</sup> *Ibid.* See G. L., c. 255, § 1.

<sup>274</sup> *McNeil v. Ames*, 120 Mass. 481; *McNeil v. Kendall*, 128 Mass. 245, 249. *Cp. infra*, § 53.

<sup>275</sup> *Martin v. Tobin*, 123 Mass. 85; *Squire v. Learned*, 196 Mass. 134.

<sup>276</sup> See *supra*, § 25.

<sup>277</sup> *Sanders v. Partridge*, 108 Mass. 556, 558.

<sup>278</sup> "It is stated generally in the text books that an actual entry upon the demised premises by an assignee of the lease is not requisite in order to charge him with the performance of covenants running with the land. But we think this proposition will hold good only in respect of assignments by deed recorded and delivered which are usually regarded as effecting a transfer not only of title but of the legal possession. An assignment without deed, as of a chattel interest only, requires some act of entry or change of actual possession to complete its operation and divest the



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there is a conveyance and the assignee accepts it and acts under it, no entry is necessary.<sup>279</sup>

§ 45. **Forbidden assignments.**—Although the lessee be under obligation not to assign, it seems that he may do so and vest his estate in the assignee, but he remains liable upon his covenant, and the estate may be subject to forfeiture in the hands of the assignee.<sup>280</sup> A lessee who assigns his lease cannot impose upon his assignee a like condition against assignment to that imposed upon himself.<sup>281</sup> Where the lease provides that assignments shall be made only with the landlord's consent, a reassignment to the lessee is valid without such consent.<sup>282</sup> The assent of the lessor cannot be implied from doubtful or negative discussions between the lessor and lessee.<sup>283</sup>

§ 46. **Attornment unnecessary.**—Formerly, at common law, to charge the assignee upon the covenants of the lessee it was necessary for the assignee to assent to the new relation by a process called attornment, but this has been dispensed with by long usage in this state.<sup>284</sup>

§ 47. **Liability and rights of assignee.**—**Liability to lessor.**—The assignee of a lease is liable to the lessor upon all covenants which run with the land.<sup>285</sup> This liability rests on possession of the premises, or "privity of estate" and continues only so long as the leasehold estate assigned continues.<sup>286</sup> One

assignor of responsibility which arises from the holding of the estate." Wells, J., in *Sanders v. Partridge*, 108 Mass. 556.

<sup>279</sup> *Simonds v. Turner*, 120 Mass. 328; *Collins v. Pratt*, 181 Mass. 345.

<sup>280</sup> Gray, *Restraints on Alienation*, 2d ed., § 278. *Cp. infra*, §§ 75, 112-118, 126-127.

<sup>281</sup> Gray, *Restraints on Alienation*, 2d ed., § 27.

<sup>282</sup> *McCormick v. Stowell*, 138 Mass. 431.

<sup>283</sup> *Russell v. Bryant*, 181 Mass. 447.

<sup>284</sup> See *supra*, § 8.

<sup>285</sup> *Daniels v. Richardson*, 22 Pick. 565; *Torrey v. Wallis*, 3 Cush. 442; *McNeil v. Kendall*, 128 Mass. 245; *Mason v. Smith*, 131 Mass. 510; *Shattuck v. Lovejoy*, 8 Gray, 205; *Gannett v. Albree*, 103 Mass. 372; *Peters v. Stone*, 193 Mass. 179.

*Historical.* Though this liability is recognized by statutes, it existed at common law. Shaw, C. J., in *Daniels v. Richardson*, 22 Pick. at p. 569. The common law of England did not permit assignees to use or be sued in covenant (see, however, *Hunt v. Thompson*, 2 Allen, 341), but this was changed by St. 32 Hen. VIII, c. 34. See note at beginning of § 54, also *infra*, § 55.

<sup>286</sup> *Mason v. Smith*, 131 Mass. 510; *Farrington v. Kimball*, 126 Mass.



important result of this principle is that the assignee of a lease may always escape liability for breaches of covenant occurring after he gets rid of the term by assigning the term to another, even though that other be a beggar or one about to leave the country, and though the assignment be made for this express purpose, without notice to the lessor, and the second assignee does not take possession.<sup>287</sup> But there must be a real intention to make an assignment, and where it is never delivered or accepted, and there is no intention that the assignee shall have possession of it, it is a mere paper transaction and the original assignee remains liable to the lessor.<sup>288</sup>

In accordance with the general principle, where the estate of the lessor is terminated by one with a paramount title, he cannot recover for use and occupation by the assignee subsequently.<sup>289</sup> So an executor or administrator of the lessee is liable if he enters and holds possession after the death of the lessee, as his assignee.<sup>290</sup>

Where there is an assignment to two or more each is liable for his share of the rent.<sup>291</sup>

It may be expressly provided that the assignee shall not be liable personally to the lessor, the lessee or any one else.<sup>292</sup>

There may be also an express agreement that the assignee

313; *Grundin v. Carter*, 99 Mass. 15; *Howland v. Coffin*, 9 Pick. 52; *Howland v. Coffin*, 12 Pick. 125; *Bell v. American Protective League*, 163 Mass. 558, 561; *Donaldson v. Strong*, 195 Mass. 429; *Harmon, Wastcoat, Dahl Co. v. Star Brewing Co.*, 232 Mass. 566. A contract to reassign the lease after certain things are done does not operate as a present reassignment, but, on the other hand, is evidence of the acceptance of the assignment. *Simonds v. Turner*, 120 Mass. 328.

As the liability rests on privity of estate, any action by or against the assignee must be brought in the county where the land lies. See § 273, *infra*.

<sup>287</sup> 2 Taylor, *Landl. & Ten.*, 9th ed., § 452; *Patten v. Deshon*, 1 Gray, 325, 329, 330; *Donaldson v. Strong*, 195 Mass. 429. See *infra*, § 56.

<sup>288</sup> *Harmon, Wastcoat, Dahl Co. v. Star Brewing Co.*, 232 Mass. 566. *Cp. Maionica v. Piscopo*, 217 Mass. 324.

<sup>289</sup> *Grundin v. Carter*, 99 Mass. 15; *Carter v. Russell*, 101 Mass. 53.

<sup>290</sup> *Inches v. Dickinson*, 2 Allen, 71.

<sup>291</sup> *Montague v. Gay*, 17 Mass. 439; *Daniels v. Richardson*, 22 Pick. 565. See G. L., c. 186, § 4; R. L., c. 129, § 4; Pub. St., c. 121, § 4, and see § 234, *infra*.

<sup>292</sup> *E. g.*, in *Pond v. Torrey*, 180 Mass. 226.

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shall be substituted for the lessee, so that the assignee is liable by his contract.<sup>293</sup>

§ 48. **Liability to assignor.**—If the assignor of a lease is compelled to pay rent, taxes or other sums to the lessor, during the term and while the assignee is in possession, he is entitled to be reimbursed by the assignee irrespective of any covenant to that effect by the assignee,<sup>294</sup> unless it is expressly agreed that the assignee shall not be liable;<sup>295</sup> and the statute of frauds does not apply.<sup>296</sup>

Similarly, he may recover of a second assignee under the same circumstances;<sup>297</sup> but, in the absence of an express agreement, the assignee is not liable to reimburse the original lessee for sums in the payment of which a second assignee has made default.<sup>298</sup> And in no case can the original lessee claim to be reimbursed by his assignee until he has actually been compelled to pay to the lessor.<sup>299</sup>

§ 49. **Rights of assignee against lessor.**—An assignee cannot maintain an action against the lessor for a breach of a covenant running with the land which took place before the assignment, as the right to sue is a chose in action which does not pass with the land.<sup>300</sup>

§ 50. **Liability of assignor after assignment.**—To lessor.—The assignor of a lease remains liable to the lessor during the term upon the express covenants of the lease through privity of contract, even though the assignee be also liable through

<sup>293</sup> *Harmon, Wastcoat, Dahl Co. v. Star Brewing Co.*, 232 Mass. 566. Here the consideration was an agreement by the assignee to perform the covenants of the lease.

<sup>294</sup> *Farrington v. Kimball*, 126 Mass. 313; *Patten v. Deshon*, 1 Gray, 325, 330; *Mason v. Smith*, 131 Mass. 510; *Collins v. Pratt*, 181 Mass. 345.

The assignee is obviously not liable on the covenants directly, as the lessee has nothing in the way of an interest left upon which to base his claim. *Hicks v. Downing*, 1 Ld. Ray. 99.

<sup>295</sup> *Pond v. Torrey*, 180 Mass. 226.

<sup>296</sup> *Collins v. Pratt*, 181 Mass. 345.

<sup>297</sup> *Mason v. Smith*, 131 Mass. 510. And the fact that the assignment to the second assignee was not recorded is immaterial, *Ibid.*

<sup>298</sup> *Mason v. Smith*, 131 Mass. 510 (taxes).

<sup>299</sup> *Farrington v. Kimball*, 126 Mass. 313. "If he is a surety, then he must pay the debt for which he is liable before he can recover of the principal," p. 215, per Endicott, J.

<sup>300</sup> *Shelton v. Codman*, 3 Cush. 318. *Cp.* G. L., c. 231, § 5; R. L., c. 173, § 4; St. 1897, c. 402. *Bacon v. Loud*, 226 Mass. 447, 449.

privity of estate.<sup>301</sup> And the acceptance by the lessor of rent from the assignee does not bar an action for other sums against the original lessee, where the lease contains an express covenant for the payment of rent; but the action is upon the covenant and not by privity of estate.<sup>302</sup>

If the lessor agrees to accept the tenancy of the assignee in place of that of the lessee, the latter is of course discharged from liability on the covenants;<sup>303</sup> but the intent to accept such substituted tenancy must be clearly shown.<sup>304</sup>

The receipt by the lessor of rent from the assignee may have some tendency to show a substitution, although it is

<sup>301</sup> *Mason v. Smith*, 131 Mass. 510; *Farrington v. Kimball*, 126 Mass. 313; *Wall v. Hinds*, 4 Gray, 256; *Blake v. Sanderson*, 1 Gray, 332; *Sanders v. Partridge*, 108 Mass. 556; *Patten v. Deshon*, 1 Gray, 325, 330; *Pfaff v. Golden*, 126 Mass. 402; *Greenleaf v. Allen*, 127 Mass. 248; *Deane v. Caldwell*, 127 Mass. 242; *Way v. Reed*, 6 Allen, 364; *Dwight v. Mudge*, 12 Gray, 23; *Johnson v. Stone*, 215 Mass. 219; *Taylor v. Kennedy*, 228 Mass. 390; *Harmon, Westcoat, Dahl Co. v. Star Brewing Co.*, 232 Mass. 566. See *Inches v. Dickinson*, 2 Allen, 71.

And this is true, even though the lessor reënter for condition broken by express provision of the lease and relets to another tenant. *Way v. Reed*, 6 Allen, 364. *Cp. Fifty Associates v. Grace*, 125 Mass. 161.

<sup>302</sup> *Fletcher v. McFarlane*, 12 Mass. 43; *Wall v. Hinds*, 4 Gray, 256; *Deane v. Caldwell*, 127 Mass. 242; *Johnson v. Stone*, 215 Mass. 219.

"It is to be borne in mind that a mere assignment of a lease by a lessee does not absolve him from liability. He cannot by his own acts avoid his covenants. . . . Doubtless it is competent for a lessor to enter into such stipulations with an assignee as to accept him as sole tenant and to absolve the original lessee from his contracts. But an intent to create a new contract and to annul the lease as against the original lessee must be clearly shown; otherwise the rule of law by which the lessee and the assignee will both be held liable to the lessor must prevail. There are cases where an express agreement by an assignee to pay rent to the lessor and to perform all the covenants of a lease, if assented to and received by the latter, would be evidence tending to show a substitution of the assignee in place of the original lessee and an intention to discharge the lessee from all further liability under the lease." *Bigelow, C. J.*, in *Way v. Reed*, 6 Allen, 368, 369.

<sup>303</sup> *Golding v. Brennan*, 183 Mass. 286; *Way v. Reed*, 6 Allen, 364, 369; *Patten v. Deshon*, 1 Gray, 325, 330; *Harmon, Westcoat, Dahl Co. v. Star Brewing Co.*, 232 Mass. 566. *Cp. Wood v. Partridge*, 11 Mass. 488, 491.

<sup>304</sup> *Way v. Reed*, 6 Allen, 364, 369; *Harmon, Westcoat, Dahl Co. v. Star Brewing Co.*, 232 Mass. 566.

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not conclusive.<sup>305</sup> But where the assignee, by consent of the lessor, is to hold the premises upon different terms, or for a different purpose, there is a substituted tenancy, and the lessee is discharged.<sup>306</sup>

If one of two lessees is described as a "surety," and his co-lessee assigns with his consent and that of the lessor, he remains liable on his covenants, even though the lessor takes a written contract from the assignee to fulfil the provisions of the lease, and though the premises are used for an unlawful purpose and the lessor enters for breach of agreement.<sup>307</sup>

§ 51. Assignor's liability to assignee.—Where the effect of the assignment is to put the assignee in place of the assignor, both as to benefits and burdens, the assignee cannot have an action against the assignor for an eviction but only against the lessor.<sup>308</sup>

§ 52. Liability of parties under a sublease.<sup>309</sup>—A sublease creates a distinct tenancy between the parties to it, and does not put the sublessee in the place of the lessee as an assignment does.

Therefore, it is the lessee and not a sublessee who is liable to the lessor for breach of covenants in the lease;<sup>310</sup> and a lessee and a sublessee are not jointly liable for the profits of the whole premises.<sup>311</sup> It likewise follows that the remedies of the sublessee under his sublease are against his lessor, and not against the original lessor.<sup>312</sup>

<sup>305</sup> *Patten v. Deshon*, 1 Gray, 325, 330; *Randall v. Rich*, 11 Mass. 494, 496; *Fletcher v. McFarlane*, 12 Mass. 43, and cases cited *supra*.

<sup>306</sup> *Fifty Associates v. Grace*, 125 Mass. 161; *Amory v. Kannoisky*, 117 Mass. 351. See *Golding v. Brennan*, 183 Mass. 286; *Carpenter v. Pocasset Manuf. Co.*, 180 Mass. 180, 183.

But this result may of course be avoided by an express stipulation between the lessor and assignor that the latter's liability shall continue. *Fifty Associates v. Grace*, 125 Mass. 161.

<sup>307</sup> *Way v. Reed*, 6 Allen, 364.

<sup>308</sup> *Waldo v. Hall*, 14 Mass. 486.

<sup>309</sup> As to the liability of a sublessee for taxes, see *infra*, § 65.

<sup>310</sup> *Campbell v. Stetson*, 2 Met. 504; *Dunlap v. Bullard*, 131 Mass. 161; *Shattuck v. Lovejoy*, 8 Gray, 205; *Miller v. Prescott*, 163 Mass. 12.

<sup>311</sup> *Fifty Associates v. Howland*, 5 Cush. 214. Whether they might be jointly liable in trespass for the profits of the part occupied by the sublessee, *qu.*

<sup>312</sup> *Waldo v. Hall*, 14 Mass. 486; *Casassa v. Smith*, 206 Mass. 69; *Smith v. Abbott*, 221 Mass. 326.

There is an implied covenant in a sublease that the lessor will protect the title of the lessee. Therefore where the sublessor fails to perform his covenants and thereby loses his estate and subjects his sublessee to eviction by the original lessor, the sublessee is not obliged to wait for a technical eviction but may attorn to the original lessor and look to the sublessor for damages.<sup>313</sup>

(b) ASSIGNMENT BY LESSOR <sup>314</sup>

§ 53. Form.—The principles of form, especially in regard to sealed instruments, have been already discussed,<sup>315</sup> and we have seen that an assignment must be in writing, and should be under seal; for, if an assignment by the lessor is by an instrument not under seal, the purchaser gets only an equitable title to the rent, and not such a legal title as to enable him to maintain an action on it in his own name as assignee.<sup>316</sup> It is not necessary, however, that the rent and the reversion be assigned together; the rent or the reversion may be assigned separately. Any agreement giving another a lien upon rents must be in writing; as rent, being an incorporeal hereditament, is an interest in lands and the statute of frauds applies.<sup>317</sup>

“The rent may be granted away reserving the reversion; and the reversion may be granted away reserving the rent by special words. By a general grant of the reversion the rent will pass with it as an incident to it; but by a general grant of the rent the reversion will not pass.<sup>318</sup> Rent, that is, the right to recover future instalments of rent as they become due under the lessee’s covenant to pay rent in the future, is not a chose in action, but is an incorporeal interest in land which can be assigned only by instrument under seal.”<sup>319</sup>

An assignment of rent is subject to the rule of *caveat emptor* as against a purchaser of the reversion.<sup>320</sup>

<sup>313</sup> *Casassa v. Smith*, 206 Mass. 69.

<sup>314</sup> *Cp.* Tenancy as between Mortgagor and Mortgagee, *supra*, §§ 5–8.

<sup>315</sup> *Supra*, § 43.

<sup>316</sup> *Bridgham v. Tileston*, 5 Allen, 371.

<sup>317</sup> *Elmore v. Symonds*, 183 Mass. 321. See G. L., c. 259, § 1, cl. 4.

<sup>318</sup> *Winnisimmet Trust, Inc. v. Libby*, 232 Mass. 491; *Burden v. Thayer*,

3 Met. 76; *Beal v. Boston Car Spring Co.*, 125 Mass. 157.

<sup>319</sup> *Winnisimmet Trust, Inc. v. Libby*, 232 Mass. 491, 492, per Pierce, J.

<sup>320</sup> *Winnisimmet Trust, Inc. v. Libby*, 232 Mass. 491.

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"When the rent is assigned, without the reversion, the assignee may sue the lessee [in his own name] for rent accruing after the assignment; because the privity of contract is transferred."<sup>321</sup>

The usual case of assignment by a lessor is where he grants his estate by deed or mortgage, and in such case the grantee or mortgagee becomes the landlord in the lessor's stead and without any entry;<sup>322</sup> and the grant operates as an assignment of the lease as well as a conveyance of the reversion.<sup>323</sup> The assignment may, however, take the form of a longer lease, subject to an existing lease, the new lessee to collect from the first lessee rent for the latter's unexpired term.<sup>324</sup> So an at-

<sup>321</sup> *Hunt v. Thompson*, 2 Allen, 341, 342, per Metcalf, J.; *Kendall v. Carland*, 5 Cush. 74; *Patten v. Deshon*, 1 Gray, 325; *Beal v. Boston Car Spring Co.*, 125 Mass. 157; *Smith v. Jennings*, 15 Gray, 69. *Cp. infra*, § 54; *Porter v. Merrill*, 124 Mass. 534, 541.

But a paper authorizing X. or his assigns to collect the rent due from Y. "now overdue and unpaid and any taxes due from him by suit if necessary but at his cost and expense; or receive in my name any dividends from his estate," is not an assignment but a mere power of attorney. *Lord v. Carnes*, 98 Mass. 308.

Rent payable under a lease, where the lessor is to perform no personal services for the lessee, is not "earnings" under R. L., c. 189, § 34, requiring an assignment of future earnings to be recorded in order to be valid against trustee process. *Kendall v. Kingsley*, 120 Mass. 94.

In *Smith v. Jennings*, 15 Gray, 69, a lessor, by a sealed instrument, assigned his right to certain rents for one year in consideration of the assignee's agreement to pay certain debts of the lessor, and it was held to be an assignment valid against trustee process to the extent of payments by the assignee, although made before collecting the rents.

<sup>322</sup> *Commonwealth v. Leach*, 1 Mass. 59; *Farley v. Thompson*, 15 Mass. 25, 26; *Burden v. Thayer*, 3 Met. 76; *Newall v. Wright*, 3 Mass. 138; *Fitchburg Cotton Mfg. Co. v. Melven*, 15 Mass. 268; *Russell v. Allen*, 2 Allen, 42; *Mirick v. Hoppin*, 118 Mass. 582; *Holmes v. Turner's Falls Co.*, 142 Mass. 590; *Noble v. Brooks*, 224 Mass. 288; *Taylor v. Kennedy*, 228 Mass. 390, 394.

*Cp. Cary v. Whiting*, 118 Mass. 363, and *supra*, § 8. As to Attornment see *supra*, §§ 8, 46, and *infra* in this section.

<sup>323</sup> *Taylor v. Kennedy*, 228 Mass. 390, 394; *McNeil v. Ames*, 120 Mass. 481; *McNeil v. Kendall*, 128 Mass. 245, 249.

<sup>324</sup> *Harmon v. Flanagan*, 123 Mass. 288.

In *Shea v. McCauliff*, 186 Mass. 569, there was a lease to A and B, and before its expiration the lessor made a new lease to A, which provided that rents paid under the first lease should be credited under the second.

attachment and sale on execution of the lessor's interest will operate as an assignment.<sup>325</sup> A mortgage of the land will not ordinarily operate as an assignment of a lease of part of it, but if it were it would be only an assignment in mortgage.<sup>326</sup> The right to receive rents may be transferred by an entry of a mortgagee of the estate for condition broken,<sup>327</sup> but a mere right of entry for forfeiture is not assignable.<sup>328</sup> The reversion expectant on a term for years may be assigned and be sufficient without any attornment by the tenant, though apparently notice to the tenant is necessary to charge him.<sup>329</sup>

A contemporaneous assignment and reassignment does not operate to change the title, and the lessor may lawfully demand rent of the tenant, although the latter was ignorant of the assignment, in the absence of estoppel.<sup>330</sup>

It was held that, even if the second lease were an assignment of the reversion, the lessor reserved the right to the rents payable under the first lease, and that A and B were still liable.

<sup>325</sup> *Buffum v. Deane*, 4 Gray, 385; *Marsters v. Cling*, 163 Mass. 477. *Cp.* § 44, *supra*. And the tenant cannot set off a debt due from the lessor contracted after the attachment. *Buffum v. Deane*, 4 Gray, 385.

<sup>326</sup> *Martin v. Tobin*, 123 Mass. 87.

<sup>327</sup> For the principles governing such an assignment, see *supra*, § 8.

If a lessee covenants to pay rent in advance, and the mortgagee enters for condition broken on the day the rent is due, the mortgagor is not entitled to that instalment. *Smith v. Shepard*, 15 Pick. 147.

<sup>328</sup> *Trask v. Wheeler*, 7 Allen, 109.

<sup>329</sup> St. 4 & 5 Anne, c. 16, made attornment unnecessary, but all payments of rent to the lessor before notice of the assignment are valid and binding against the grantee. "I have always understood that attornment was never considered necessary under the provincial government to complete the validity of an assignment. It was a doctrine of the old feudal law and was not applicable to our tenures. But probably notice was required here before the statute of Anne, as a substitute for attornment; or if it were not so, as the provision of the statute is founded upon a principle of universal equity, it must be supposed to have been adopted here, unless the contrary can be shown." . . . Per Wilde, J., in *Farley v. Thompson*, 15 Mass. 18, 25; *Commonwealth v. Leach*, 1 Mass. 61; *Burden v. Thayer*, 3 Met. 76. *Cp. supra*, §§ 8, 46.

And unless notice of the assignment is given to the tenant, the latter is liable to be judged trustee of the assignor. *Wood v. Partridge*, 11 Mass. 488.

See also *infra*, § 54.

<sup>330</sup> *Borden v. Sackett*, 113 Mass. 214.



## § 53a TENANCY FOR YEARS UNDER A WRITTEN LEASE

§ 53a. **Liability and rights of assignor.**—Where a lessor grants his reversion to another, privity of estate ceases.<sup>331</sup> As to privity of contract, the lessor may have a remedy for breaches of contract by the lessee occurring before the transfer but not for those occurring afterwards.<sup>332</sup>

But, unless it is otherwise provided in the lease, the lessor remains liable on his covenants after deeding away his estate; because one cannot by his own act relieve himself from his contract liabilities without the consent of the other party.<sup>333</sup>

§ 54. **Liability and rights of assignee.**—The assignee of the lessor is entitled to sue the lessee or his assignee upon the covenants in the lease, in his own name. He stands in all things in the place of the lessor,<sup>334</sup> and is therefore entitled

<sup>331</sup> 1 Tiffany, Landl. & Ten., § 148.

<sup>332</sup> *Ibid.*; 24 Cyc. 927.

<sup>333</sup> *Jones v. Parker*, 163 Mass. 564; *Carpenter v. Pocasset Mfg. Co.*, 180 Mass. 130.

<sup>334</sup> *Pfaff v. Golden*, 126 Mass. 402; *Hunt v. Thompson*, 2 Allen, 341; *Kendall v. Carland*, 5 Cush. 74; *Beal v. Boston Car Spring Co.*, 125 Mass. 157; *Patten v. Deshon*, 1 Gray, 325; *Maden v. Woodman*, 205 Mass. 4; *Richmond v. Kelsey*, 225 Mass. 209; *Essex Lunch, Inc. v. Boston Lunch Co.*, 229 Mass. 557. See *Burden v. Thayer*, 3 Met. 76, 78. See also *supra*, § 53.

It is not necessary, to enable the assignee to sue, that the reversion be assigned. "The assignment by the lessor of the lessee's covenant to pay rent in future, in consideration of the enjoyment of the premises is not the assignment of a chose in action; it is the assignment of a right to rent to grow due, and a covenant to pay it runs with the land out of which it is reserved. Such an assignee therefore is legally entitled to the rent in his own right, and may sue for it in his own name." *Patten v. Deshon*, 1 Gray, 325. See *Kendall v. Carland*, 5 Cush. 74.

The tenant when sued for rent by a grantee (*Taylor v. Kennedy*, 228 Mass. 390, 395) or a mortgagee (*Russell v. Allen*, 2 Allen, 42) cannot plead an oral agreement between the lessor and his grantee or mortgagee that the lessor shall continue to receive the rents.

*Historical.* At common law, the assignee of a reversion could neither sue nor be sued in covenant upon the covenants of the lease. Co. Lit. 215a. St. 32 Hen. VIII, c. 34, however, permitted assignees of either party to sue and be sued. See *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80, 84; *Patten v. Deshon*, 1 Gray, 325, 326; *Carpenter v. Pocasset Mfg. Co.*, 180 Mass. 133.

In *Patten v. Deshon*, 1 Gray, 325, it is said that "debt lies for rent by the assignee of the lessor at common law." See also *Hunt v. Thompson*, 2 Allen, 341; *Howland v. Coffin*, 12 Pick. 125, and *infra*, § 113.



to similar remedies against lessees and their assignees;<sup>335</sup> but a lessee who continues to pay rent to the lessor is protected until notified of the assignment,<sup>336</sup> and the rule is the same when the rent is paid in advance.<sup>337</sup>

A tenant cannot avoid paying rent to the assignee of the original landlord, unless and until the mortgagee in possession gives notice that the rent is to be paid to him, or threatens eviction, or an attornment is agreed to in recognition of the paramount title.<sup>338</sup>

The assignee of the reversion is of course entitled only to rent due after the assignment,<sup>339</sup> and he is not entitled to recover previously accruing rent in his own name, although the assignor grants it to him.<sup>340</sup>

Rent payable in advance on the day of the assignment

<sup>335</sup> *Supra*, §§ 47-52, *infra*, § 55; *Howland v. Coffin*, 9 Pick. 52; *Howland v. Coffin*, 12 Pick. 125; *Pfaff v. Golden*, 126 Mass. 402; *Montague v. Gay*, 17 Mass. 439; *Maden v. Woodman*, 205 Mass. 4; *Essex Lunch, Inc. v. Boston Lunch Co.*, 229 Mass. 557.

Where a lessor sued for rent after granting the premises, and his grantee had made a new lease subject to the lease sued upon which he had assigned to his lessee, it was held that the lessor could not amend by substituting the grantee as plaintiff. *Taylor v. Kennedy*, 228 Mass. 391, 395.

Actions by or against assignees must be brought in the county where the land lies. See *infra*, § 273.

<sup>336</sup> *Farley v. Thompson*, 15 Mass. 18; *Russell v. Allen*, 2 Allen, 42, 44; *Noble v. Brooks*, 224 Mass. 288, 291.

"It is not necessary, that this notice should be given immediately upon the assignments taking place; for between the assignor and assignee the contract is complete without any notice to the debtor. But if the debtor should pay over his debt to the assignor, to any subsequent assignee, or to any creditor who has obtained judgment against him as trustee before such notice is given, he will be protected against a second payment to the assignee." *Parker, C. J.*, in *Wood v. Partridge*, 11 Mass. 488.

<sup>337</sup> *Stone v. Patterson*, 19 Pick. 476.

<sup>338</sup> *Knowles v. Maynard*, 13 Met. 352; *Adams v. Bigelow*, 128 Mass. 365; *Holmes v. Turner's Falls Co.*, 142 Mass. 590; *Tilden v. Greenwood*, 149 Mass. 567; *Winnisimmet Trust Co. v. Libby*, 234 Mass. 407, 410.

<sup>339</sup> *Burden v. Thayer*, 3 Met. 76; *Russell v. Allen*, 2 Allen, 42, 44.

So, under a refusal to transfer an estate, and a subsequent execution, delivery and acceptance of the deed, the grantee is not entitled to rent accruing between the time agreed upon for the transfer and the actual time of transfer. *Warner v. Bacon*, 8 Gray, 397.

<sup>340</sup> *Burden v. Thayer*, 3 Met. 76.

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may be claimed by the assignee;<sup>341</sup> but if the land be sold after the receipt of rent in advance, the grantee is not entitled to the rent so advanced, even if it be so provided in the contract of sale,<sup>342</sup> and though the grantee took the land without notice of such payment. The rule of *caveat emptor* applies.<sup>343</sup>

As the assignee stands in the shoes of the assignor he is liable, without express agreement, upon all covenants which run with the land,<sup>344</sup> and whether the covenants run or not he is not entitled to prevent their performance as between the assignor and the lessee.<sup>345</sup>

The assignee of a reversion takes subject to all the rights of the lessee as expressed in the lease.<sup>346</sup>

### (c) RUNNING OF COVENANTS

§ 55. What covenants run with the land.—Covenants bind assigns of the lessor or lessee either (1) when the word “assigns” is in the lease so that they are expressly bound,<sup>347</sup> or (2) when the covenants are of such a nature that they run with the land. In this second case, assigns of the lessor could not be bound or take advantage of covenants or conditions at common law, but this was changed by St. 32 Hen. VIII, c. 34.<sup>348</sup>

If it is desired to have covenants run in all cases, it is important that the word “assigns” should be inserted in the lease after “lessor” and “lessee.”

If a covenant runs, a grantee is bound by it whether he had notice of the covenant in a lease made by his grantor or not.<sup>349</sup>

<sup>341</sup> *Smith v. Shepard*, 15 Pick. 147.

<sup>342</sup> *Stone v. Knight*, 23 Pick. 95.

<sup>343</sup> *Stone v. Patterson*, 19 Pick. 476.

<sup>344</sup> *Jones v. Parker*, 163 Mass. 564; *Sanders v. Partridge*, 108 Mass. 556; *Brewer v. Dyer*, 7 Cush. 337; 2 Ops. Atty.-Gen. 236. *Cp. supra*, §§ 47-49. As to St. 32, Hen. VIII, c. 34, *Carpenter v. Pocasset Manuf. Co.*, 180 Mass. 130, 133. *Cp. Rawle, Covenants*, 5th ed., § 215; *Ariol v. Mills*, 4 T. R. 94, 99; *Bickford v. Parson*, 5 C. B. 920, 929, 930. See *infra*, § 55, also *supra* in this section.

<sup>345</sup> *Jones v. Parker*, 163 Mass. 564.

<sup>346</sup> *Leominster Gaslight Co. v. Hillery*, 197 Mass. 267.

<sup>347</sup> As to warranties and covenants for title, see *Jones v. Parker*, 163 Mass. 564; *Hurd v. Curtis*, 19 Pick. 459, 463.

<sup>348</sup> See *supra*, § 54, and *infra*, §§ 56, 113.

<sup>349</sup> *Leominster Gaslight Co. v. Hillery*, 197 Mass. 267.

We have now to consider what covenants run with the land, although the word assigns be not used in the lease. It is a question of construction whether the immediate parties to a lease intended to define and control only their personal obligations, or whether they also intended to bind whomsoever might succeed to their respective estates; and this question must be determined from the language and purpose of the entire instrument.<sup>350</sup>

In general, covenants defining the manner in which the demised premises shall be enjoyed or dealt with run with the land and bind the covenantee.<sup>351</sup> Or, in other words, if the covenant touches the estate in respect to something already in existence, or to something to be done to increase its value to either the lessor or the lessee, it runs.<sup>352</sup> But if it does not touch the estate, as for example to build on other land or to pay a collateral sum of money, the covenant does not run.<sup>353</sup>

The following covenants have been held to run with the land, (1) to pay the agreed rent;<sup>354</sup> (2) to pay taxes,<sup>355</sup> assessments and betterments on the estate;<sup>356</sup> (3) to pay costs, charges and expenses;<sup>357</sup> (4) to pay other sums of money;<sup>358</sup> (5) not to use the premises for any unlawful purpose,<sup>359</sup> or

<sup>350</sup> *Peters v. Stone*, 193 Mass. 179, 186.

<sup>351</sup> *Peters v. Stone*, 193 Mass. 185.

<sup>352</sup> 1 *Taylor, Landl. & Ten.*, 9th ed., § 260; *Spencer's Case*, 5 Coke, 16.

<sup>353</sup> *Ibid.*

<sup>354</sup> *Kendall v. Carland*, 5 Cush. 74; *Patten v. Deshon*, 1 Gray, 325; *Sanders v. Partridge*, 108 Mass. 556; *Mason v. Smith*, 131 Mass. 510; *Daniels v. Richardson*, 22 Pick. 565; *McNeil v. Kendall*, 128 Mass. 245, *Farrington v. Kimball*, 126 Mass. 313; *Grundin v. Carter*, 99 Mass. 15; *Simonds v. Turner*, 120 Mass. 328; *Inches v. Dickinson*, 2 Allen, 71; *Way v. Reed*, 6 Allen, 364; *Dwight v. Mudge*, 12 Gray, 23; *Croade v. Ingraham*, 13 Pick. 33; *Maden v. Woodman*, 205 Mass. 4.

A covenant to pay an annual rent to a widow in an instrument purporting to be a lease, in consideration of her agreeing not to exercise her right to have dower assigned to her, is a personal covenant, and such a right cannot be the subject of a lease. *Croade v. Ingraham*, 13 Pick. 33.

<sup>355</sup> *Dunlap v. Bullard*, 131 Mass. 161; *Mason v. Smith*, 131 Mass. 510.

<sup>356</sup> *Curtis v. Pierce*, 115 Mass. 186; *Blake v. Baker*, 115 Mass. 188; *Simonds v. Turner*, 120 Mass. 328.

<sup>357</sup> *Torrey v. Wallis*, 3 Cush. 442.

<sup>358</sup> *Mason v. Smith*, 131 Mass. 510.

<sup>359</sup> *Wheeler v. Earle*, 5 Cush. 31; *Miller v. Prescott*, 163 Mass. 12.

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for "any public or objectionable purpose;" <sup>360</sup> (6) to use the premises for a particular purpose only; <sup>361</sup> (7) to renew the lease; <sup>362</sup> (8) for quiet enjoyment; <sup>363</sup> (9) to repair; <sup>364</sup> (10) to make improvements. <sup>365</sup>

The covenant of renewal in a lease runs with the land. <sup>366</sup> The covenant, however, imports a new lease like the old one in every essential particular, saving only a renewal covenant. It cannot be split into parts by the conduct of the lessee or those claiming under him. <sup>367</sup>

A covenant of suretyship for the payment of rent is personal only and does not run with the land. Therefore, the administrator of the covenantee and not the heir is the proper person to sue upon such a covenant. <sup>368</sup> Such a covenant lasts only for the term. <sup>369</sup>

Whether a covenant to deliver up the premises at the end of the term runs with the land is doubtful; <sup>370</sup> so as to running an elevator. <sup>371</sup>

The right to maintain an action for breach of a covenant running with the land, is a chose in action which does not itself run with the land; therefore an assignee cannot maintain an action against the other party to a

<sup>360</sup> *Gannett v. Albree*, 103 Mass. 372.

<sup>361</sup> *Ibid.*

<sup>362</sup> *Cunningham v. Pattee*, 99 Mass. 248; *Gannett v. Albree*, 103 Mass. 372; *Leominster Gaslight Co. v. Hillery*, 167 Mass. 267. *Cp.* *Neal v. Jefferson*, 212 Mass. 517, 522.

<sup>363</sup> *Shelton v. Codman*, 3 Cush. 318. See *Hurd v. Curtis*, 19 Pick. 459, 463.

<sup>364</sup> 1 Taylor, *Landl. & Ten.*, 9th ed., § 357. This binds an assignee of a part of the premises. *Ibid.*, § 365.

<sup>365</sup> *Peters v. Stone*, 193 Mass. 179. Covenants bind an assignee, even where assigns are not named, when the beneficial act to be performed relates solely to increasing the value of the premises as they exist at the date of the lease. *Ibid.*, p. 185; *Hurd v. Curtis*, 19 Pick. 459, 463.

<sup>366</sup> *Lawson v. Coulson*, 234 Mass. 288, 295; *Leominster Gas Light Co. v. Hillery*, 197 Mass. 267, 269.

<sup>367</sup> *Lawson v. Coulson*, *supra.*; *Barge v. Shiek*, 57 Minn. 155, 160.

<sup>368</sup> *Walsh v. Packard*, 165 Mass. 189.

<sup>369</sup> *Brewer v. Knapp*, 1 Pick. 332.

<sup>370</sup> *Sargent v. Smith*, 12 Gray, 426. To the effect that it does not, see *dictum* of Parke, B., in *Doe v. Seaton*, 2 C. M. & R. 730.

<sup>371</sup> *Cummings v. Perry*, 177 Mass. 407.

lease for a breach which took place before the assignment.<sup>372</sup>

It should be noted that, although a covenant may run with the land and bind the grantee of a lessor, the lessor cannot free himself from his covenant by transferring the title.<sup>373</sup>

### SECTION III

#### CONSTRUCTION OF EXPRESS COVENANTS AND PROVISIONS

§ 56. *In general.*<sup>374</sup>—The covenants of the lessor usually are with the “lessee and his executors, administrators and assigns.” The leasehold being personal property goes on the death of the lessee to his personal representatives.

The covenants of the lessee are usually as follows: “and the lessee for himself and his assigns hereby covenants with the lessor and his heirs and assigns, that he and his executors, administrators and assigns will” perform the various covenants set forth. The reversion of the estate remaining in the lessor is of course real estate, which descends to the heirs of the lessors, who are therefore named. The lessee should covenant for himself and his assigns, in order that all the covenants, including those as to assigning, underletting and delivering up the premises at the end of the term, may run with the land and bind assignees of the lease. It is also necessary to name the lessee’s executors and administrators, otherwise the condition not to assign will not bind them.<sup>375</sup>

“No precise words are necessary to constitute a covenant; provided we are able to collect an agreement by the parties

<sup>372</sup> *Shelton v. Codman*, 3 Cush. 318. See further, *Action on Covenants*, *infra*, § 273.

<sup>373</sup> *Neal v. Jefferson*, 212 Mass. 517 (covenant to renew); *Riley v. Hale*, 158 Mass. 240 (covenant for quiet enjoyment); *Jones v. Parker*, 163 Mass. 564, 568 (covenant to light and heat); *Carpenter v. Pocasset Manuf. Co.*, 180 Mass. 130, 133 (covenant to purchase improvements).

<sup>374</sup> For Implied Covenants, see Chapter V, *infra*. See also Subject-Matter Included, *supra*, §§ 37–40. As to the effect of assignment by the lessor or the lessee, see *supra*, §§ 42–54. As to what covenants run with the land, see *supra*, § 55.

That a provision for terminating a lease may be a conditional limitation and not a covenant, see *supra*, § 41.

<sup>375</sup> See *supra*, §§ 47, 54, 55; also Gray, *Restraints on Alienation*, 2d ed., § 101; Crocker, *Common Forms*, 4th ed., 283.

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that a certain thing shall be done, that will be sufficient to enable us to say that a covenant is created." <sup>376</sup>

§ 57. Interpretation.<sup>377</sup>—For the purpose of determining the scope and effect of a lease, it is to be construed as of the date when it was made.<sup>378</sup>

Where the clauses of a lease are inconsistent, the rule is that written clauses will control printed ones, on the theory that the latter were left in by inadvertence. But if they can all be retained and interpreted together, none is to be rejected.<sup>379</sup> A lease cannot be treated as valid as to certain covenants and invalid as to others. Thus, the lessor cannot insist on collecting rent, and claim to be absolved from liability under the covenant for quiet enjoyment.<sup>380</sup>

Where the plaintiff lessee by his voluntary and deliberate act, finds himself, under the wording of a covenant, within the grip of a bargain which is extremely burdensome, and unduly advantageous to the lessor, and the hardship arises from his voluntary act in executing the lease, and not from any misrepresentation or fraudulent conduct of the lessor, the plaintiff is not entitled to relief.<sup>381</sup>

When there are express covenants of a limited nature, no general covenant can be implied.<sup>382</sup> This proceeds on the principle that "when parties have entered into an engagement with express stipulations, the presumption is that they have expressed all the conditions by which they intend to be bound and we cannot extend their covenants by implication unless the implication is clear and undoubted." <sup>383</sup> Evidence of the lessor's declarations, tending to show his understanding and

<sup>376</sup> Parke, B., in *James v. Cochrane*, 7 Exch. 170, quoted in *Smiley v. McLauthlin*, 138 Mass. 363. "No precise form of technical words is required to create a covenant, but corresponding expressions, or a clear manifestation of such an intention are all that is required." *Peters v. Stone*, 193 Mass. 179, 185, per Braley, J.; *Trull v. Eastman*, 3 Met. 121, 124.

<sup>377</sup> As to collateral agreements, see *supra*, § 41a.

<sup>378</sup> *Goldsmith v. Traveller Shoe Co.*, 221 Mass. 482.

<sup>379</sup> *Ball v. Wyeth*, 8 Allen, 275; *Weeks v. Wilhelm-Dexter Co.*, 220 Mass. 589.

<sup>380</sup> *Riley v. Hale*, 158 Mass. 240. For other cases of election, compare *Bradley v. Brigham*, 149 Mass. 141; *Ormsby v. Dearborn*, 116 Mass. 386.

<sup>381</sup> *Hippodrome Amusement Co. v. Wit*, 233 Mass. 216.

<sup>382</sup> *Summer v. Williams*, 8 Mass. 162, 201 (case of deed). See also *supra*, § 38, and *infra*, § 186.

<sup>383</sup> *Smiley v. McLauthlin*, 138 Mass. 363, 364, per Morton, C. J.

construction of the lease, is not competent upon the question of its meaning.<sup>384</sup>

Exceptions and reservations in a lease are to be construed in favor of the lessor.<sup>385</sup>

Where both parties to a lease have placed a certain construction upon it as to the extent of the premises covered by it, which is not contrary to its terms and which is not forbidden by any rule of law, they will be bound by such construction.<sup>386</sup>

**Custom.**—In general, a custom is admissible to explain what is doubtful; but when the terms of a lease are plain the right of one party to it cannot be taken away by custom.<sup>387</sup>

§ 58. **Dependent and independent covenants.**—It is often important to distinguish between mere independent covenants and those which are conditional, *i. e.*, which are to be performed only upon performance of some covenant by the other party.<sup>388</sup> “The evident intent and meaning of the parties as expressed in the instrument must determine whether the covenants are independent or conditional,”<sup>389</sup> and the manner in which they are expressed, and their position in the instrument, are not conclusive upon the question of their independence of each other.

If the covenants be dependent, a party who fails to perform his covenant, or who prevents the other party from performing his obligation, cannot complain of a lack of performance by the other party.<sup>390</sup> Leases are to be construed as far as possible beneficially for the lessee, so as to enable him to use

<sup>384</sup> *Bigelow v. Callamore*, 5 Cush. 226, 230.

<sup>385</sup> *Dexter v. Manley*, 4 Cush. 14. *Cp. supra*, § 38.

<sup>386</sup> *Arafe v. Howe*, 228 Mass. 47. *Cf. supra*, §§ 36, 37.

<sup>387</sup> *Bornszweski v. Middlesex Mutual Assur. Co.*, 186 Mass. 589, 593 (insurance contract); *Follins v. Dill*, 221 Mass. 93, 97 (where the point was referred to, but not decided).

See also §§ 12, 66, 68, 69, 72, 84, 201, 202, 212, 217.

<sup>388</sup> On this matter see generally, 2 *Parsons on Contracts*, 9th ed., 683, note 7, 829–832; 1 *Taylor, Landl. & Ten.*, 9th ed., §§ 265, 276; 1 *Wood, Landl. & Ten.*, 2d ed., 581–587. See also as to conditions, *infra*, §§ 112–118.

<sup>389</sup> *Jackson, J.*, in *Gardiner v. Corson*, 15 Mass. 500, 503.

<sup>390</sup> *Borden v. Borden*, 5 Mass. 67; *Couch v. Ingersoll*, 2 Pick. 292 (cases of deeds). But a proviso as to alterations, to be performed by the lessee, is not necessarily a condition precedent to the vesting of the estate. *Lowell Meeting-House v. Hilton*, 11 Gray, 407, 409. See *Popanastos v. Heller*, 227 Mass. 74.



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the premises for the purposes for which the lease is made.<sup>391</sup> Therefore, where the landlord is expressly required to do some act which is essential to the enjoyment of the estate demised, his covenant will be held precedent to the covenants of the lessee, such as to pay rent.<sup>392</sup> Similarly, the covenant express or implied for quiet enjoyment is concurrent with the covenants of the lessee as to rent, so that for an eviction the lessee is entitled to refuse performance of his covenant;<sup>393</sup> but, in general, the covenant by the landlord to repair and the covenant of the lessee to pay rent are independent.<sup>394</sup>

§ 58a. Definition of rent.—The word “rent,” as used by the parties in a contract between a landlord and a broker in regard to procuring a tenant at a commission based on a percentage of the rent, is to be construed in accordance with its usual and ordinary meaning; so construed it means the amount to be paid for the use and occupation of the premises, and does not include the amount to be paid by the lessee as taxes or for the cost of improvements.<sup>395</sup> While undoubtedly “rent” may be so construed in written lease as to include taxes, cost of improvements and other payments to be made by the lessee, still such an interpretation is not to be adopted in the absence of a clear intention of the parties to that effect expressed in the lease.<sup>396</sup> When rent is reserved, it is an incident, though not inseparably so, to the reversion.<sup>396a</sup> The rent may be granted away reserving the reversion; and the reversion may be granted away reserving the rent by special words. By a general grant of the reversion the rent will pass with it as an incident to it, but by a general grant of the rent the reversion will not pass.<sup>397</sup>

<sup>391</sup> *Dexter v. Manley*, 4 Cush. 14; *Cook v. Bisbee*, 18 Pick. 527.

<sup>392</sup> *Weed v. Crocker*, 13 Gray, 219; *Popanastos v. Heller*, 227 Mass. 74. See *infra*, §§ 242, 264.

<sup>393</sup> See §§ 59–61, 77–80, 141–144, 254.

<sup>394</sup> *Royce v. Guggenheim*, 106 Mass. 201, 203; *Leavitt v. Fletcher*, 10 Allen, 119, 121; *Emmons v. Scudder*, 115 Mass. 367. Cp. *Kramer v. Cook*, 7 Gray, 550, 553, and see *infra*, § 249.

<sup>395</sup> *Guild v. Sampson*, 232 Mass. 509, 513; *Smith v. Abington Savings Bank*, 171 Mass. 178, 184.

<sup>396</sup> *Guild v. Sampson*, 232 Mass. 509, 514; *Hodgkins v. Price*, 137 Mass. 13; *Kites v. Church*, 142 Mass. 586.

<sup>396a</sup> Co. Lit. 143a, 151b.

<sup>397</sup> *Winnisimmet Trust v. Libby*, 232 Mass. 491, 492; *Demarest v. Willard*, 8 Cowen, 206; *Burden v. Thayer*, 3 Met. 76; *Beal v. Boston Car Spring Co.*, 125 Mass. 157. See *infra*, § 59.



§ 59. **Payment of rent.**<sup>398</sup>—The clauses as to payment of rent are usually as follows: The *reddendum* clause has at the end, “yielding and paying rent therefor the sum of—— for each and every year, and after the same rate for any part of the year. And the said lessee for himself and his executors and administrators, does hereby covenant to and with the said lessor and his heirs and assigns that he or they will pay the said rent monthly in equal sums of——the first of which payments shall be made on the——day of—— A. D.——and that he or they will pay rent at the same rate for such further time as he the said lessee or those claiming under him may hold the premises.”<sup>399</sup>

The object of inserting an express covenant is to secure the responsibility of the lessee for all rent which may become due during the term. As we have seen elsewhere an occupant of premises is liable to pay what they are reasonably worth, but in the absence of an express covenant the lessee could terminate his liability for future rent at any time by assigning over to another.<sup>400</sup> Where the covenant is inserted it is not necessary for the lessee to enter, as non-payment of rent is itself a breach of covenant.<sup>401</sup> We have already seen that the covenant to pay rent runs with the land.<sup>402</sup>

Rent when due is personal property; it is a *chose in action* and does not pass to a vendee of the land.<sup>403</sup> Therefore rents accruing during the lifetime of a lessor pass to his administrator, and those accruing afterward pass to his heirs or devisees.<sup>404</sup> But rent, that is, the right to recover future instalments of rent as they become due under the lessee's covenant to pay rent in the future, is not a *chose in action*, but is an incorporeal interest in land which can be assigned only by an instrument under seal. When assigned, the assignee

<sup>398</sup> See also *Abatement of Rent*, *infra*, §§ 83–86; *Apportionment of Rent*, *infra*, §§ 222–225; *Action for Rent*, *infra*, §§ 228–254.

<sup>399</sup> Sometimes the rent is “payable after the termination of each month of the tenancy.” *Hammond v. Thompson*, 168 Mass. 531 (case of tenancy at will).

<sup>400</sup> See *supra*, § 50 and *infra*, § 228.

<sup>401</sup> *McGlynn v. Brock*, 111 Mass. 219.

<sup>402</sup> *Supra*, § 55.

<sup>403</sup> *Burden v. Thayer*, 3 Met. 76; *Codman v. American Piano Co.*, 229 Mass. 285, 289.

<sup>404</sup> *Clark v. Seagraves*, 186 Mass. 430, 439; *Codman v. American Piano Co.*, 229 Mass. 285, 289.

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holds the interest in his own right and may sue for it in his own name.<sup>404a</sup>

§ 60. In case of holding over.—The provision for payment “for such further time, etc.,” does not give the tenant the right to hold over, nor enlarge his estate, nor make him, if he holds over, a tenant at will; he is only a tenant at sufferance.<sup>404b</sup> Since the statute making tenants at sufferance liable for such time as they occupy,<sup>405</sup> the landlord, without the above provision, can recover the fair value of the premises; whereas, with the provision, he can recover rent only at the rate mentioned. The covenant is, however, convenient as preventing disputes. Such a provision obliges the lessee to pay rent at the stipulated rate, if he holds after the end of the term, when the latter occurs by the death of the lessor<sup>406</sup> as well as by its own limitation,<sup>407</sup> or by reason of a forfeiture.<sup>408</sup> Unless this clause is inserted, a guaranty of payment of rents, etc., ends with the term.<sup>409</sup> The estate may be conditional upon the payment of rent, as was the case under the following clause in a lease: <sup>410</sup> “for the term of one year, from the 15th day of September, 1845, unless the rent herein reserved shall be in arrear, or unpaid, for the space of one week after the same shall become due and payable, and, in such case, only until the expiration of said one week; yielding, etc.” <sup>411</sup>

§ 61. To whom payable and when.—Rent may be reserved generally without stating to whom it is to be paid. In such a case, if the lessor die, the lease is not determined, and the rent is payable to his heirs as determined by the law of dis-

<sup>404a</sup> *Winnisimmet Trust v. Libby*, 232 Mass. 491, 492; see also *Patten v. Deshon*, 1 Gray, 325, 327; *Bridgham v. Tileston*, 5 Allen, 371.

<sup>404b</sup> *Edwards v. Hale*, 9 Allen, 464; *Salisbury v. Hale*, 12 Pick. 422. See *infra*, § 184.

<sup>405</sup> G. L., c. 186, § 3. For citations on this statute, see *infra*, § 184.

<sup>406</sup> *Jaques v. Gould*, 4 Cush. 384.

<sup>407</sup> *Rice v. Loomis*, 139 Mass. 302.

<sup>408</sup> *Sutton v. Goodman*, 194 Mass. 389, 395.

<sup>409</sup> See *Guaranty of Rent*, *infra*, § 64.

<sup>410</sup> *Earle v. Kingsbury*, 3 Cush. 206.

<sup>411</sup> *Cp. Bartlett v. Greenleaf*, 11 Gray, 98, where rent payable in advance was to be suspended if the lessors deprived lessee of water-power.

tribution; <sup>412</sup> but rent already due at the death of the lessor goes to his personal representatives. <sup>413</sup>

Rent is payable up to midnight of the day when it is due. <sup>414</sup> The day of payment is usually expressly named or indicated in the lease; but if there is no agreement the matter is governed by custom, if there be any, otherwise rent is payable at the end of the term. <sup>415</sup> If it is payable on certain days, a provision that after sixty days' default the lessor may enter and take possession does not extend the time of payment nor postpone the right to sue for rent overdue. <sup>416</sup>

Where there is a provision that the lessor shall erect certain buildings for which the lessee agrees to pay an additional rent "of ten per cent, on the cost," no rent is due until notice to the lessee of the cost; <sup>417</sup> and similarly when the lessee agrees to pay rent for certain water power, and furnish some of the machinery, and the lessor agreed to furnish other machinery, no rent is due until the lessor has furnished his part of the machinery. <sup>418</sup> A provision in a lease that no rent shall be payable until a delivery of possession can be made free from all encumbrances, except certain tenancies, a mortgage made for the purpose of discharging existing mortgages, which mortgage is expressly made subject to the lease, is not an encumbrance within the provision. <sup>419</sup>

§ 62. In what payable.—Rent may be payable in goods as well as in money, and when a certain amount of iron was named as the rent in a lease, it was held that an acceptance of a sum of money as an equivalent of the iron for a number of years did not permanently commute the payment in kind. <sup>420</sup>

<sup>412</sup> *Jaques v. Gould*, 4 Cush. 385; *Clark v. Seagraves*, 186 Mass. 430, 439; *Codman v. American Piano Co.*, 229 Mass. 285, 289.

<sup>413</sup> *Clark v. Seagraves*, 186 Mass. 430, 439; *Codman v. American Piano Co.*, 229 Mass. 285, 289.

<sup>414</sup> *Smith v. Shepard*, 15 Pick. 147.

<sup>415</sup> 3 Kent, Com. 468.

<sup>416</sup> *Rowe v. Williams*, 97 Mass. 163.

<sup>417</sup> *Weed v. Crocker*, 13 Gray, 219. *Cp. Popanastos v. Heller*, 227 Mass. 74.

<sup>418</sup> *Ibid.*

<sup>419</sup> *Ober v. Brooks*, 162 Mass. 102. If the lessee enters and acts under the lease he is estopped to allege that there are encumbrances. *Ibid.*

<sup>420</sup> *Lilley v. Fifty Associates*, 101 Mass. 432.

Where, as in this case, the particular article specified has passed out of

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So, rent may consist in furnishing board to the lessor and his family;<sup>421</sup> and an agreement to pay taxes on the premises makes the amount of the taxes a part of the rent.<sup>422</sup>

A stipulation that the lessor shall receive a sum as rent to be measured by the number of bricks made on the premises, and if pipe clay is found on the premises, a certain other sum, does not require the lessee to make any bricks, or entitle the lessor to any compensation if he does not make bricks or manufacture clay.<sup>423</sup> Rent may consist of a share of the profits of a business; as where the owner of property leased it for mercantile purposes agreeing to receive part of the profits, and it was held that he received his share as rent and not as a partner.<sup>424</sup>

As to provisions giving the lessor a right to enter and take growing crops or other produce, see *infra*, § 209; and as to sharing crops, *infra*, § 211.

§ 63. Payment of rent to a third person.—Where it is agreed that the lessee shall deduct from the first rents and pay to a third person “the cost of floors and such further general use, the lessee is entitled to sufficient notice to enable him to procure the specified thing.

In *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80, the lessees covenanted to occupy and improve an ore bed, which was the subject-matter of the lease, in a proper manner, and to dig and take therefrom such quantities of ore as should be considered as improving the same in a good, husbandlike and thorough manner, and keep a true account of the ore they should dig, and for each and every ton of ore, when the same should have been weighed and taken from the premises, to pay a certain sum. It was also agreed that if the rent should be in arrears and unpaid for the space of three months, or if the lessees should “neglect to improve said ore bed in the manner above described” the lessor might reënter.

<sup>421</sup> *Baker v. Adams*, 5 Cush. 99; *Johnson v. Carter*, 16 Mass. 443. Where the rent in such a case is payable by the year, it is not allowable for the landlord having received part to attempt to divide it and deprive the tenant of occupation for the year. *Baker v. Adams*, 5 Cush. 99.

<sup>422</sup> *Ex parte Houghton*, 1 Lowell, 554, but not as to abatement, see *infra*, § 84.

<sup>423</sup> *Smiley v. McLauthlin*, 138 Mass. 363. The same manner of computing rent was provided for in *Ex parte Wait*, 7 Pick. 105, but the lessee covenanted to manufacture a certain number of bricks each year, and to pay for the clay at a certain rate. There was also an option in the lessor to take bricks instead of cash in payment of rent, but this was held to give the lessor no property in or lien upon the bricks until an election shown by taking them, and to terminate with the death of the lessee.

<sup>424</sup> *Holmes v. Old Colony R. R. Co.*, 5 Gray, 58.

sums as the parties shall hereafter agree, or shall hereafter be determined, is due" from the lessor to the third person for labor and materials, the lessee may retain a reasonable sum to pay the third person, though the amount due the latter has not been agreed upon or determined when the rents out of which the reservation is to be paid fall due.<sup>425</sup>

§ 64. Guaranty of rent.<sup>426</sup>—A guaranty of the payment of rent is usually made by some third person. The form of such a guaranty, to be endorsed on the lease, may be as follows:

"In consideration of the making of the within written lease I, A. B., do covenant with the lessor named therein and his heirs, executors, administrators and assigns, that if any default shall be made by the lessee named therein, his executors, administrators and assigns in the performance of any of the within covenants on his part to be performed, I will pay the said rent or any arrears thereof remaining due, and all damages arising from the breach of said covenants or either of them, without notice of such default from the lessor or other person having his estate in the premises. Witness my hand and seal this——day of—— 19—." <sup>427</sup> The guaranty may be made by a pledge of personal property.<sup>428</sup> It is usually

<sup>425</sup> Hunt v. Thompson, 2 Allen, 341.

<sup>426</sup> See also *infra*, § 237.

<sup>427</sup> Another and shorter form, similar to that used in Salisbury v. Hale, 12 Pick. 416, is as follows: "I, A. B., hereby guarantee the performance of the covenants of the within named [lessee] as within expressed. Witness my hand and seal this——day of—— 18—."

<sup>428</sup> Thus in Wilkie v. Day, 141 Mass. 68, a lease of a woodlot "with the privilege" to the lessees "of cutting and removing all the wood and timber from the same" on or before a certain day, contained this clause: "It is agreed and understood by the parties to this instrument that the wood and timber on the above described premises shall be held by the lessor as guaranty for the payment" of rent and interest. In Hall v. Middleby, 197 Mass. 485, the lessee gave a mortgage of his stock and fixtures.

See also, as to produce of estate being held for rent: Butterfield v. Baker, 5 Pick. 522; Munsell v. Carew, 2 Cush. 50. *Cp.* Lewis v. Lyman, 22 Pick. 437; *Ex parte* Wait, 7 Pick. 100; *supra*, § 40 and *infra*, § 209.

In C. E. Osgood Co. v. Way, 173 Mass. 135, the guaranty was as follows: "I hereby guarantee that the payments on this lease shall be made in accordance with the terms herein specified with the understanding that if said Way has to pay the debt the C. E. Osgood Company will assign their interest in said lease to said Wm. T. Way." Under this provision it was held that, even if liability on the guaranty was concurrent with the

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but not always under seal; <sup>429</sup> and, where under seal, the presumed consideration will support the guaranty, whether made at the date of the lease or later. <sup>430</sup> So the forbearing to eject a tenant at will from a tenement is a good consideration for a guaranty of both past and future rent. <sup>431</sup>

Sometimes a sum of money is deposited with a third person by the tenant as security for the payment of rent. In such a case, if the rent is paid and the deposit has been invested, the tenant is entitled to recover not only the deposit but interest earned thereon. <sup>432</sup>

**§ 64a. Duration of covenant.**—The covenant of suretyship does not last beyond the term of the lease, <sup>433</sup> but if the lease contains a covenant by the lessee to pay during the term “and for such further time as the lessee shall hold” the premises, a guarantor of the fulfilment of the covenants is liable on his guaranty under this clause, <sup>434</sup> unless there is some language showing a different intention. <sup>435</sup>

A guaranty of rent, due and to become due for a certain length of time, from a tenant at will, is not extinguished by ejectment at the request of the guarantor or the entrance of a new tenant. <sup>436</sup> The mere fact that a second guaranty for a larger amount is given by the first guarantor and another does not tend to show the first guaranty was extinguished, as they may be cumulative. <sup>437</sup>

**§ 64b. Action upon guaranty.**—The contract of guaranty is a personal covenant only, and therefore the administrator and not the heir of the covenantee is the proper person to sue upon it. <sup>438</sup> “It is true no doubt, that the heirs are the only persons interested in the rent, and therefore are the only persons who suffer substantial damages by a failure to pay it. We assume that, if the administratrices recover substantial assignment, an action on the guaranty might be maintained though the assignment of the lease had been waived.

<sup>429</sup> *Salisbury v. Hale*, 12 Pick. 416.

<sup>430</sup> *Roth v. Adams*, 185 Mass. 341.

<sup>431</sup> *Vinal v. Richardson*, 13 Allen, 521.

<sup>432</sup> *Thompson v. Knapp*, 223 Mass. 277.

<sup>433</sup> *Brewer v. Knapp*, 1 Pick. 332; *Warren v. Lyons*, 152 Mass. 310.

<sup>434</sup> *Salisbury v. Hale*, 12 Pick. 416; *Rice v. Loomis*, 139 Mass. 302.

<sup>435</sup> *Woods v. Doherty*, 153 Mass. 558.

<sup>436</sup> *Vinal v. Richardson*, 13 Allen, 521.

<sup>437</sup> *Lumiansky v. Tenier*, 213 Mass. 182.

<sup>438</sup> *Walsh v. Packard*, 165 Mass. 189. “The covenant is collateral to the lease and is not affected by St. 32, Hen. VIII, c. 34,” per Holmes, J.

damages they will receive them as trustees for the heirs . . . unless we are prepared to hold that assigns could sue in their own names upon this contract, we ought to adhere to the general rule and allow the administratrices to maintain the action.”<sup>439</sup> Although the covenant binds only the covenantor as “surety,” and makes no mention of heirs, executors, administrators and assigns, yet the nature and object of the contract may make the collateral undertaking as large as the principal one.<sup>440</sup>

Notice to the guarantor that the tenant has not paid the rent is not a condition precedent to the guarantor’s liability,<sup>441</sup> and the lessor is under no duty of diligence in collecting rents or in notifying the guarantor of successive defaults.<sup>442</sup>

In an action of contract for rent under a guaranteed lease, where both the lessee and the guarantor are made defendants, the lessor must ordinarily elect at the trial against which of the defendants he will proceed.<sup>443</sup>

Unless a guaranty contains a stipulation that the lessor shall obtain judgment against the lessee before demanding payment of the guarantor, such action is not necessary.<sup>444</sup> Indeed, under an absolute guaranty, the guarantor is not entitled to notice of a default on the part of the lessee, and must ascertain the same at his peril.<sup>445</sup>

Where the guaranty is in a separate instrument, it seems that a lessor cannot maintain a joint action against the lessee and the guarantor.<sup>446</sup>

§ 64c. Release of guarantor.—A guarantor is not released by an agreement between the lessor and the lessee, made without his knowledge, providing that judgment shall be entered in an action for rent pending between the lessor and the lessee and that execution shall not issue until a certain time which is earlier than it would have issued in the ordinary case of procedure; for such an agreement does not amount to an extension of time.<sup>447</sup> Nor is he released by an agreement

<sup>439</sup> *Walsh v. Packard*, 165 Mass. 189.

<sup>440</sup> *Ibid.*

<sup>441</sup> *Vinal v. Richardson*, 13 Allen, 521.

<sup>442</sup> *Welch v. Walsh*, 177 Mass. 555.

<sup>443</sup> *Roth v. Adams*, 185 Mass. 341.

<sup>444</sup> *Ibid.*

<sup>445</sup> *Ibid.*

<sup>446</sup> *Lumiansky v. Tenier*, 213 Mass. 182, 190.

<sup>447</sup> *Bothfeld v. Gordon*, 190 Mass. 567.



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between the lessor and lessee, while such action is pending, that the premises shall be surrendered.<sup>448</sup> Nor does the ejectment of a tenant at will or the entrance of a new tenant extinguish the guaranty.<sup>449</sup>

§ 65. **Payment of taxes and assessments.**—In the absence of any special covenant in regard to taxes, the lessor as owner is the one ultimately to pay all taxes and assessments;<sup>450</sup> but not water rates.<sup>451</sup> And a provision that a lessee shall pay certain taxes strengthens the presumption that he is not to pay any others.<sup>452</sup> The covenant of the lessee as to taxes is usually “to pay all taxes, water rates and assessments to which said premises or any part thereof may become liable during said term.” Sometimes the lessor is to pay the taxes and the lessee all other charges and expenses.<sup>453</sup>

Where the lessee agrees to pay “all taxes and assessments whatsoever, except betterment taxes, which may be levied for or in respect of the said leased premises, or any part thereof, or upon or in respect of the rent payable hereunder by the lessee, howsoever and to whomsoever assessed,” he must pay a federal income tax imposed on the rent as income of the lessor;<sup>454</sup> but in the case of a covenant to pay only “all taxes and assessments whatsoever which may be payable for or in respect of the leased premises” the lessee is not liable for a federal income tax on the rent.<sup>455</sup>

A covenant to “pay and discharge any taxes or excises which during the term may be lawfully levied, laid or assessed

<sup>448</sup> *Bothfeld v. Gordon*, 190 Mass. 567.

<sup>449</sup> *Vinal v. Richardson*, 13 Allen, 521.

<sup>450</sup> *Walker v. Whittemore*, 112 Mass. 187, 189; *Boston Molasses Co. v. Commonwealth*, 193 Mass. 387, 391. See also *infra*, § 69.

<sup>451</sup> See *infra*, § 66.

<sup>452</sup> *Boston Molasses Co. v. Commonwealth*, 193 Mass. 387.

<sup>453</sup> *Torrey v. Wallis*, 3 Cush. 443. In this case the language of the covenant was as follows: “The lessor for himself and his legal representatives, agrees to pay all taxes that may be assessed thereon during the term of this lease. The lessee for himself and his legal representatives in this behalf, agrees to pay all costs, expenses and charges, except the yearly taxes,” etc. In *Phinney v. Foster*, 189 Mass. 182, the terms of a particular lease were held not to oblige the lessor to pay taxes on structures erected by the lessee. So also in *Boston Molasses Co. v. Commonwealth*, 193 Mass. 387.

<sup>454</sup> *Suter v. Jordan Marsh Co.*, 225 Mass. 34.

<sup>455</sup> *Codman v. American Piano Co.*, 229 Mass. 285.



upon or against the rent payable hereunder, whether levied or assessed upon the same as rental or as income of any person or persons entitled thereto" obliges the lessee to pay the surtax assessed to the lessor under the provisions of U. S. St., 1913, c. 16, and U. S. St., 1916, c. 463, and U. S. St., 1917, c. 63, upon the rent reserved.<sup>456</sup>

Where the covenant is to pay "any taxes or excises which during the term may on any assessment day be lawfully levied or assessed to either the lessors or the lessees upon or against the rent payable hereunder for or in respect of the period between such assessment day and the last prior assessment day, or for or in respect of the period between the first of such assessment days and one calendar year prior thereto, whether levied or assessed upon the same as rental or income, but not for any other taxes or excises in respect thereof," this includes a normal federal income tax assessed as of the last day of the calendar year, but it seems would not include income taxes retroactively levied beyond the express limitation of the covenant.<sup>457</sup>

We have already seen that the covenant to pay taxes, assessments or other sums of money levied upon the estate, is one which runs with the land.<sup>458</sup>

An assessment upon an estate under the betterment acts for a street widening is a tax within the covenant.<sup>459</sup> But if the covenant be simply to pay taxes, the question whether the lessor or the lessee is to pay an assessment for a radical improvement of a permanent nature, depends upon the intention of the parties, as disclosed, for example, by the length of the term. This principle has been stated by the court<sup>460</sup> as follows: "In a covenant for the payment of taxes by a

<sup>456</sup> *Kimball v. Cotting*, 234 Mass. 172; *Welch v. Phillips*, 224 Mass. 267.

<sup>457</sup> *Kimball v. Cotting*, 229 Mass. 541.

<sup>458</sup> *Supra*, § 55.

<sup>459</sup> *Curtis v. Pierce*, 115 Mass. 186; *Harvard College v. Boston*, 104 Mass. 470; *Dorgan v. Boston*, 12 Allen, 223; *Codman v. Johnson*, 104 Mass. 491; *Blake v. Baker*, 115 Mass. 188; *Simonds v. Turner*, 120 Mass. 328; *Wheatland v. Boston*, 202 Mass. 258, 262; *Codman v. American Piano Co.*, 229 Mass. 285, 290. See G. L., c. 80; R. L., c. 50; Pub. St., c. 51; St. 1884, c. 280; St. 1882, c. 154, § 7; St. 1893, c. 300, § 2; St. 1894, c. 288, § 2; St. 1891, c. 170, § 3; St. 1887, c. 124. *Cp.* *Boston Asylum v. Street Com'rs*, 190 Mass. 485; *Williams College v. Williamstown*, 219 Mass. 46.

<sup>460</sup> *Harvard College v. Boston*, 104 Mass. 470, 483, per Wells, J. *Cp.* *Torrey v. Wallis*, 3 Cush. 442.

In *Codman v. Johnson*, 104 Mass. 491, it was held a tenant under a

lessee it is to be ascertained by construction what was contemplated by the parties in the use of the terms employed. Those terms are not necessarily to be taken in their strict legal signification. In a lease for years, especially if for a short term, containing a covenant that the tenant shall pay all taxes assessed upon or in respect of the premises during the term, it would hardly be supposed that the parties intended that the lessee should pay an extraordinary assessment laid upon the premises in view of the permanently increased value of the estate by reason of a public improvement in its vicinity unless the terms used were such as to admit. The contrary presumption is stronger or weaker according to the length of the term of the lease. It may be affected by the character, situation and condition of the estate, the mode and purpose of the occupation of the tenant and by all the circumstances of the particular case. Much weight is sometimes given to the consideration that the assessment in question is of a kind in use at the time the covenant was entered into, or on the other hand of a novel and newly authorized nature." An express exception is sometimes inserted covering "assessments for any permanent benefit or improvement to said premises under any betterment law or otherwise, for or by reason of which they [the lessee, his executors, etc.] shall not be liable to make any payment."

The mere fact that the law under which the assessment is imposed was not in existence at the time the lease was made is immaterial;<sup>461</sup> and the passage of a statute after the lease was made, regulating the payment of assessments as between lessors and lessees, does not relieve the lessee from his covenant as worded.<sup>462</sup> When taxes are levied upon the owner personally and not on the estate, although "in respect of the premises" leased, the lessee does not assume to pay them by his covenant.<sup>463</sup> When the covenant is to pay "the annually

twenty year lease must pay a street alteration assessment, the court saying the length of term justified such payment, especially as the law under which the alteration was made was in force, and the alteration itself contemplated when the lease was made.

<sup>461</sup> *Walker v. Whittemore*, 112 Mass. 187; *Welch v. Phillips*, 224 Mass. 267; *Suter v. Jordan Marsh Co.*, 225 Mass. 34, 37.

<sup>462</sup> *Ibid.*

<sup>463</sup> *Twycross v. Fitchburg R. R. Co.*, 10 Gray, 293 (pavement of sidewalk creating no lien on estate); *Torrey v. Wallis*, 3 Cush. 442.

recurring municipal tax and not any betterment taxes for street construction or other special taxes or assessments," the term "municipal" includes state and county taxes as well as the city tax.<sup>464</sup>

The usual covenant is to pay taxes "which may be payable for or in respect of the said premises or any part thereof during the term," and this includes taxes assessed during the term but not payable under the law until a date subsequent to the end of the term.<sup>465</sup> Such a covenant does not contemplate the payment by the lessee of any taxes which may have been assessed prior to the commencement of the term though they may be payable within it.<sup>466</sup>

The covenant is usually independent of the covenant to pay rent, but may be discharged by an eviction like the latter.<sup>467</sup>

Where a lessee was to pay all taxes and on April 5, 1905, sublet to one who agreed to pay the taxes for 1905 adjusted as of July 1, 1905, it was held the year referred to was the assessment year and not the calendar year, and the sublessee must pay five-sixths of the tax.<sup>468</sup>

Where a term ended on April 30, and the lessee agreed to pay all taxes "whether in the nature of taxes now in being or not," and during the term the date of assessing taxes was changed from May 1 to April 1,<sup>469</sup> it was held that the lessee must pay the tax of the last year, even though the effect was that he had to pay taxes for a period of one year more than the length of his term.<sup>470</sup>

Where a lessee agreed to pay six per cent of the excess of valuation by the assessors in any year over "the present valuation, namely, \$98,900," and the lease was executed subsequent to April 1 of the year in which the assessment was

<sup>464</sup> *Boston Fish Market Corp. v. Boston*, 224 Mass. 31, 36.

<sup>465</sup> *Wilkinson v. Libbey*, 1 Allen, 375; *Paul v. Chickering*, 117 Mass. 265; *Hooper v. Farnsworth*, 128 Mass. 487; *Richardson v. Gordon*, 188 Mass. 279; *Welch v. Phillips*, 224 Mass. 267; *Amory v. Melvin*, 112 Mass. 83; *Baker v. Horan*, 227 Mass. 415. "Or during such further time as said lessees shall hold the premises." *Tuckerman v. Sleeper*, 9 Cush. 177.

<sup>466</sup> *Wilkinson v. Libby*, 1 Allen, 375.

<sup>467</sup> *Hall v. Middleby*, 197 Mass. 485, 490.

<sup>468</sup> *J. L. Hammett Co. v. Alfred Peats Co.*, 217 Mass. 520. The date of assessment being now April 1, the decision would now be that the sublessee should pay three-quarters of the tax.

<sup>469</sup> By St. 1909, c. 440. See G. L., c. 59, § 21.

<sup>470</sup> *Welch v. Phillips*, 224 Mass. 267.

\$98,900, and the assessment of the following year was much higher, it was held that the present valuation as contemplated in the lease was \$98,900 and the lessee must pay six per cent of the excess.<sup>471</sup>

Another form is to pay "such sum or sums of money as shall be equal to the amount of the taxes and duties and water taxes, that shall be levied or assessed on the demised premises for each year and part of a year during the term aforesaid, and during such further time as the said lessee and those claiming under him may hold the premises."<sup>472</sup> It has been suggested that the usual form above given conveys the idea that the lessee is liable only for taxes payable during the term, and that a better form is a covenant to pay all taxes "to which the said premises or any part thereof may be or become liable during said term." Some of the current forms embody this phraseology.<sup>473</sup>

The fact that, after the tax has been assessed, the lessor sells the estate and the purchaser agrees to pay the tax for the current year or a part of it, has no effect upon the liability of the lessee to pay the lessor according to his covenant. It is only a method of computing the purchase price.<sup>474</sup> Where the law provides that the tax is to be assessed as of a certain day, the fact that the valuation and assessment are in fact completed much later and after the expiration of the term, does not relieve the tenant. "The assessment when completed relates back."<sup>475</sup>

§ 66. Water rates.—Water rates do not constitute a lien upon the premises which a lessor is ultimately obliged to pay, as in the case of taxes.<sup>476</sup> Therefore, when the lease is silent as to who shall pay the rates, the lessor is not obliged to pay

<sup>471</sup> Winsor v. Ulin, 223 Mass. 282.

<sup>472</sup> "For such further time, etc." Where instead of renewing a term it was agreed that the tenant might continue to occupy "at the same rate," it was held that he was liable only for that part of the taxes which was proportionate to the portion of the year during which the tenancy continued. May v. Rice, 108 Mass. 150.

<sup>473</sup> Crocker, Notes on Common Forms, 4th ed., 286.

<sup>474</sup> Paul v. Chickering, 117 Mass. 265.

<sup>475</sup> Amory v. Melvin, 112 Mass. 83; Baker v. Horan, 227 Mass. 415, 419. Evidence as to the customary time of making the valuation and of paying taxes is inadmissible. Baker v. Horan, 227 Mass. 415, 419.

<sup>476</sup> Turner v. Revere Water Co., 171 Mass. 329.

them; and, if the lessee pays, he cannot recover them from the lessor or set them off against the rent.<sup>477</sup> Even where the lease provides that the lessee shall pay water rates, if there are several tenants and only one meter, and the lessor has made no attempt to apportion the bill for water for the whole building, he cannot enter and terminate the lease for non-payment of the rates.<sup>478</sup>

§ 67. **Abatement of taxes.**—By statute,<sup>479</sup> tenants who are under obligation to pay the whole or a major part of taxes assessed on the rented premises may apply for an abatement of the same, with like effect as if the owner had applied, and no neglect of the owner to file a list of his estate shall prevent such abatement from being made. This act “is not intended to apply to tenants who are also part owners of the real estate for which they pay rent, and the neglect which the statute excuses, saying that it shall not prevent the making of an abatement, is not the personal neglect of the tenant, but of some other owner of the land which the tenant is under obligation to pay taxes upon.”<sup>480</sup>

If the betterment is assessed during the term, the fact that a reduction is made in the amount after the expiration of the term does not relieve a lessee who has covenanted to pay “all taxes and duties levied or to be levied” during the term.<sup>481</sup>

**As between lessor and lessee.**—The lessee will not be allowed any abatement if the premises are destroyed by fire shortly after the date fixed for payment, even though the lease contain a provision for abatement of rent in that case.<sup>482</sup> Similarly where rent is suspended “until the lessor shall rebuild” and he never does rebuild.<sup>483</sup> A sale by the lessor and termination of the lease shortly after the fire does not relieve the lessee from liability for the year’s taxes.<sup>484</sup> On the

<sup>477</sup> *Leighton v. Ricker*, 173 Mass. 564.

<sup>478</sup> *Harford v. Taylor*, 181 Mass. 266. As to apportionment, *cp. Stimson v. Crosby*, 180 Mass. 296.

<sup>479</sup> G. L., c. 59, §§ 59, 61; R. L., c. 12, §§ 73, 74; St. 1888, c. 315.

<sup>480</sup> *Barker, J.*, in *Ashley v. County Commissioners*, 166 Mass. 216.

<sup>481</sup> *Blake v. Baker*, 115 Mass. 188.

<sup>482</sup> *Sargent v. Pray*, 117 Mass. 267; *Wood v. Bogle*, 115 Mass. 30; *Paul v. Chickering*, 117 Mass. 265; *Howe v. Bryant*, 117 Mass. 273*n.*; *Carnes v. Hersey*, 117 Mass. 269; *Hodgkins v. Price*, 137 Mass. 13.

<sup>483</sup> *Minot v. Joy*, 118 Mass. 308.

<sup>484</sup> *Paul v. Chickering*, 117 Mass. 265.

same principle, if he has already paid the taxes to the lessor or to the municipal authorities, the lessee cannot recover any part thereof of the lessor in case the premises are destroyed by fire.<sup>485</sup>

§ 68. **Apportionment of taxes.**—If there be a usage to apportion taxes among several tenants of an estate in proportion to their rents, the covenant is to pay the proportion of the whole tax falling to the tenant's share.<sup>486</sup> Such is the custom in Boston.<sup>487</sup> "Though an estate is leased to several independent tenants, taxes are uniformly assessed upon the whole estate. The covenant of each tenant to pay taxes cannot be construed to mean the taxes upon the whole estate. From the nature of the case some mode of apportioning the whole tax must be contemplated by the parties. The usage to apportion it in proportion to the rents paid by the tenants is a convenient and reasonable usage, and in the absence of any express stipulation upon the subject, the parties must be deemed to have contracted in reference to it."<sup>488</sup> If there is no special usage, the lessee must pay "such part of the entire tax assessed on the whole estate as the portion thereof demised by the lease bears to the entire premises."<sup>489</sup>

A covenant "in case the taxes now levied on said premises should be increased above the present assessment, that the lessee shall pay such excess" obliges the lessee to pay the excess of the tax on the whole of a building, although the lessee held under two leases of different dates, and of different parts of the building, which together covered the whole building except one closet, and both leases provided that the lessee

<sup>485</sup> *Wood v. Bogle*, 115 Mass. 30; *Wilkinson v. Libbey*, 1 Allen, 375; *Carnes v. Hersey*, 117 Mass. 269; *Howe v. Bryant*, 117 Mass. 273*n*.

<sup>486</sup> See *Codman v. Hall*, 9 Allen, 335; *Amory v. Melvin*, 112 Mass. 83; *Stimson v. Crosby*, 180 Mass. 296, 298.

<sup>487</sup> *Codman v. Hall*, 9 Allen, 335.

<sup>488</sup> *Amory v. Melvin*, 112 Mass. 83.

<sup>489</sup> *Wall v. Hinds*, 4 Gray, 256, 269, per Bigelow, J. The court also said: "The precise sum could not be fixed in the lease because it would necessarily be uncertain, and might vary from year to year. Nor could the mode of apportionment be well made to depend upon the act of the assessors of the city. They were official persons bound to perform a certain duty, but they were not obliged to regard the special agreements of individuals as to the mode of assessing or apportioning taxes on their property."

should pay the taxes but the covenant quoted was only in the second lease.<sup>490</sup>

§ 69. Lessor, lessee and municipality.—In the absence of express provision, the landlord is to pay taxes; but, as against the municipality, the land which is in the possession of the tenant is liable for the tax, and the remedies of the city or town may be against him.<sup>491</sup>

The statutes provide that taxes “shall be assessed, in the town where it lies, to the person who is either the owner or in possession thereof on April first,”<sup>492</sup> and that “If a tenant paying rent for real estate is taxed therefor, he may retain out of his rent the taxes paid by him, or may recover the same in an action against his landlord, unless there is a different agreement between them.”<sup>493</sup>

“The statute means the actual possession which a tenant occupying the premises has, as distinct from the constructive possession which the owner may have; and, if the tenant is in possession, it is immaterial whether he holds under the owner, or the agent of the owner, or a stranger.”<sup>494</sup> “The parties may by agreement decide as between themselves

<sup>490</sup> *Stimson v. Crosby*, 180 Mass. 296. As to an agreement for an apportionment of the increased tax, as to time, see *Winsor v. Ulin*, 223 Mass. 282.

<sup>491</sup> 1 Taylor, *Landl. & Ten.*, 9th ed., § 395. But as to water rates there is no lien which the landlord is ultimately obliged to pay; and, if the lease being silent on the subject, the lessee pays, he cannot recover the amount paid from the lessor or set it off against a claim for rent.

*Leighton v. Ricker*, 173 Mass. 564. See *supra*, § 66.

<sup>492</sup> G. L., c. 59, § 11; R. L., c. 12, § 15; St. 1902, c. 113; St. 1889, c. 84; Pub. St., c. 11, § 13.

<sup>493</sup> G. L., c. 59, § 15; R. L., c. 12, § 20; Pub. St., c. 11, § 17; Gen. St., c. 11, § 9; Rev. St., c. 7, § 8; St. 1830, c. 151, § 3. *Wood v. Bogle*, 115 Mass. 30; *Boston Molasses Co. v. Commonwealth*, 193 Mass. 387.

Query whether this statute is binding upon the commonwealth. *Boston Molasses Co. v. Commonwealth*, 193 Mass. 387.

*Historical.* Evidence of payment of rent by a tenant for thirty years and of his giving a note for a balance due was held to be proof of a contract to pay taxes under the Province Law providing that “where no contract is” the landlord shall reimburse half the taxes. *Jackson v. Frye*, Quincy, 26 (1762). See *Derumple v. Clark*, Quincy, 38 (1763).

<sup>494</sup> *Lynde v. Brown*, 143 Mass. 337, 340, per W. Allen, J. *Cp. Kerslake v. Cummings*, 180 Mass. 65; *Boston Molasses Co. v. Commonwealth*, 193 Mass. 387.



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which shall bear the tax; but no agreement of parties whether made before or after the passage of a tax act can exempt property from taxation according to the laws in force when the property reaches that stage at which it is declared by those laws to be taxable. It is within the province of the legislature to determine, not only which party shall pay the amount of the tax to the government, but upon whom the burden shall finally rest; and also, for greater certainty and convenience in the collection of the tax, to provide that the amount of the tax shall be paid by one party to the government, and recovered by him from the other party or deducted upon a final settlement with him.”<sup>495</sup>

It is provided by statute that, “If an assessment is made upon land the whole or part of which is leased, the owner shall pay the assessment, and may collect of the lessee an additional rent for the portion so leased equal to ten per cent per annum on that proportion of the amount paid which the leased portion bears to that of the whole estate, after deducting from the whole amount any money received for damages to such land in excess of what he has necessarily expended thereon by reason of such damages. A lessee aggrieved by the imposition of this burden, may, within six months from the time demand is made upon him for such additional rent, file a petition in the superior court for the county in which the land is situated, to determine the proportion of the assessment which he ought to bear, and the proportion determined upon the petition shall be substituted for the proportion provided by this section. If such proportion is reduced the lessee shall recover costs from the owner; otherwise the owner shall recover costs from the lessee.”<sup>496</sup> “If the tenant has covenanted to pay all taxes, ordinary and extraordinary alike, it is not in the power of the legislature to alter his contract, and substitute another less burdensome to the lessee in its place, without the consent of the lessor. We must therefore consider the statute as establishing the rule only for cases in which the parties have not otherwise provided by the terms of their lease.”<sup>497</sup>

This statute creates a future liability only upon the tenant,

<sup>495</sup> Gray, J., in *Ammidown v. Freeland*, 101 Mass. 303.

<sup>496</sup> G. L., c. 80, § 11; R. L., c. 50, § 8; Pub. St., c. 51, § 8; St. 1871, c. 382, § 9. Cited in *Snow v. Rice*, 207 Mass. 331.

<sup>497</sup> Ames, J., in *Walker v. Whittemore*, 112 Mass. 187.



from the time the tax is paid by the lessor.<sup>498</sup> If, therefore, the lessor delays payment of the tax, even though for the purpose of seeking an abatement, until after the term expires, the tenant is not liable for any part of it.<sup>499</sup>

§ 69a. Where lessee covenants to pay taxes.—The covenant of the lessee is to pay taxes to the lessor and not to the municipality; and is therefore an absolute covenant, and not a contract of indemnity.<sup>500</sup>

If the lessee covenant to pay the taxes on a certain day and do not pay, the lessor may maintain an action on the covenant, although he has not at the time of suing paid the tax himself.<sup>501</sup> But the lessor is not entitled to be reimbursed for costs where he refuses to pay in the lessee's stead.<sup>502</sup> In a case where it was held that a lease provided in effect that the lessor should pay taxes on the land and the lessee taxes on certain buildings, it was held that the lessor who had paid taxes on the whole property, to prevent a sale, could recover the proportionate part of taxes on the buildings from the lessee.<sup>503</sup> The fact that the lessor has voluntarily paid the taxes for certain years does not release the lessee from liability to pay taxes subsequently levied within the term.<sup>504</sup> Where it is customary to apportion taxes among the tenants according to their proportion of rents, the lessor may sue each tenant for his proportion of the total tax.<sup>505</sup>

It is not necessary for a tenant, in order to prevent a forfeiture for non-payment of rent, to tender to the lessor unpaid taxes, even though the lessor has been obliged to pay them.<sup>506</sup>

§ 70. Insurance.<sup>507</sup>—The lessor usually continues any in-

<sup>498</sup> *Snow v. Rice*, 207 Mass. 331.

<sup>499</sup> *Ibid.*

<sup>500</sup> *Bowditch v. Chickering*, 139 Mass. 283; *Sargent v. Pray*, 117 Mass. 267; *Richardson v. Gordon*, 188 Mass. 279.

<sup>501</sup> *Sargent v. Pray*, 117 Mass. 267; *Wilkinson v. Libbey*, 1 Allen, 375; *Bowditch v. Chickering*, 139 Mass. 283; *Amory v. Melvin*, 112 Mass. 83; *Richardson v. Gordon*, 188 Mass. 279. See *Paul v. Chickering*, 117 Mass. 265; *Simonds v. Turner*, 120 Mass. 328.

<sup>502</sup> *Sargent v. Pray*, 117 Mass. 267.

<sup>503</sup> *Phinney v. Foster*, 189 Mass. 182.

<sup>504</sup> *Bowditch v. Chickering*, 139 Mass. 283.

<sup>505</sup> *Amory v. Melvin*, 112 Mass. 83.

<sup>506</sup> *Hodgkins v. Price*, 137 Mass. 13, 19.

<sup>507</sup> As to liability insurance, see *infra*, § 344.

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insurance upon the premises for his own protection, when the lease is silent upon the matter of insurance.

The insurable interest of the lessor as reversioner is not merely nominal; <sup>508</sup> even though the lease contain no provision for abatement of rent in case of destruction by fire or for the termination of the lease in such an event. <sup>509</sup>

Sometimes, however, leases contain covenants, similar to those in mortgages, that the lessee shall keep buildings fully insured during the term, in offices to be approved by the lessor, to whom the insurance money is to be payable. <sup>510</sup> Under such a covenant if, by accident or mistake, the insurance is made payable to the wrong party or the covenant is otherwise broken, but no damage results to the lessor, equity will relieve against a forfeiture. <sup>511</sup>

Where the lessee covenants to "pay all insurance" this is for the benefit and indemnity of the lessor; <sup>512</sup> and the covenant is not satisfied by insurance in the name of the lessee. <sup>513</sup> Query whether such a covenant to pay insurance is a personal covenant of indemnity or runs with the land. <sup>514</sup> In such a case, if the lessee fails to effect insurance, the lessor may do so and recover the cost from the lessee. <sup>515</sup>

<sup>508</sup> *Richmond v. Kelsey*, 225 Mass. 209.

<sup>509</sup> *Ibid.*

<sup>510</sup> *Mactier v. Osborn*, 146 Mass. 399; *Anthony v. N. Y., P. & B. R. R. Co.*, 162 Mass. 61.

In *Quincy v. Carpenter*, 135 Mass. 102, the covenants were as follows:

"And said lessees, for themselves and those having their estate in the premises, hereby covenant with the said lessor and his heirs and assigns that they will during said term . . . pay all extra insurance upon the demised premises occasioned by any use to which the same may be put by the lessees or those claiming under them.

"And the lessor covenants for himself and his heirs and assigns, with the lessees and those having their estate in the premises, that he will keep the premises well insured, the lessees as herein before provided, paying for extra insurance occasioned by the use to which the premises may be put by them or those claiming under them."

<sup>511</sup> *Mactier v. Osborn*, 146 Mass. 399.

<sup>512</sup> *Richmond v. Kelsey*, 225 Mass. 209; *Adams v. North American Ins. Co.*, 210 Mass. 550, 552.

<sup>513</sup> *Richmond v. Kelsey*, 225 Mass. 209. Query as to a policy payable to the lessor and lessee as their respective interests may appear. *Ibid.*

<sup>514</sup> *Richmond v. Kelsey*, 225 Mass. 209, 212.

<sup>515</sup> *Richmond v. Kelsey*, 225 Mass. 209.

If, by the terms of the lease, the lessor is to procure and the lessee to pay for all extra insurance caused by the use to which the premises are put, and such insurance is obtained and paid for and a receipt is given the lessee in full of all extra insurance, the lessor is not entitled to collect from the lessee for further insurance because all the companies at first insured in have failed.<sup>516</sup>

There is frequently a covenant by the lessee that "no act or thing shall be done upon said premises, which may make void or voidable any insurance of the said premises or building against fire, or may render any increased or extra premium payable for any such insurance."<sup>517</sup> It was held that, under this covenant, the lessor having paid extra premiums required by the use of large varnish tanks by the lessee, the former could recover the expense from the latter, if he did not know the lessee was to use them, even though he knew at the time of making the lease that the lessee had previously used such tanks elsewhere.<sup>518</sup>

If the landlord uses reasonable care and diligence in the selection of his tenants and in the management of the estate, his insurance is not affected through the tenants' keeping of inflammable articles like straw upon the premises without his knowledge or consent.<sup>519</sup>

§ 71. Repairs and rebuilding.—Redelivery in good order.<sup>520</sup>—Repairs in the absence of express agreement.—In the absence of express covenant the landlord is not bound to make any repairs,<sup>521</sup> except on parts of the property over which

<sup>516</sup> *Quincy v. Carpenter*, 135 Mass. 102. See *White v. Mutual Assurance Co.*, 8 Gray, 566.

<sup>517</sup> *King v. Murphy Varnish Co.*, 188 Mass. 66.

<sup>518</sup> *Ibid.*

<sup>519</sup> *White v. Mutual Assurance Co.*, 8 Gray, 566.

<sup>520</sup> See also *infra*, §§ 198–201. As to Mechanics' Liens, see *infra*, § 347.

<sup>521</sup> *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, 9 Cush. 242; *Welles v. Castles*, 3 Gray, 326; *Leavitt v. Fletcher*, 10 Allen, 119; *Kearnes v. Cullen*, 183 Mass. 298; *Roth v. Adams*, 185 Mass. 341; *Galvin v. Beals*, 187 Mass. 250; *Cummings v. Ayer*, 188 Mass. 292; *Phelan v. Fitzpatrick*, 188 Mass. 237; *Stewart v. Cushing*, 204 Mass. 154; *Walsh v. Schmidt*, 206 Mass. 405; *Conahan v. Fisher*, 233 Mass. 234, 238.

If there are two tenements in one house and the upper tenant repairs the roof, he cannot compel the under tenant to contribute to the cost thereof. *Loring v. Bacon*, 4 Mass. 575.

A landlord owes no duty to the lessee, guests or members of his family,

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he retains control, including those parts used in common by the tenants. Thus, where stairs are let as part of the tenement, and no control is retained or exercised by the landlord, there can be no recovery for personal injuries suffered by the tenant or members of his family, unless at the time of the letting the landlord by special agreement undertakes to make repairs either with or without notice.<sup>522</sup>

But a landlord must exercise due care to keep a piazza or other parts of the premises used in common by his tenants, in such condition as, to a person of ordinary observation, it would appear to be at the time of letting, where there is no express agreement on the subject.<sup>523</sup>

The common law relating to tenancies at will is not repealed or modified by St. 1907, c. 550, § 127, which provides that owners of buildings in Boston shall maintain their premises in such repair as not to be dangerous, and in case of such tenancy no liability on the landlord for obvious defects or want of repair arises unless he contracts to keep the premises in a safe condition and to make repairs.<sup>524</sup>

It is customary to insert a provision that the tenant "will allow the lessor and his heirs and assigns and their agents at seasonable times to enter upon said premises and examine the condition thereof and make necessary repairs," but this clause does not impose upon the lessor any liability to repair, nor alter the obligations of the tenant in regard thereto.<sup>525</sup>

A covenant that a house is "now in perfect order" refers only to repairs and is not a warranty of fitness for occupation.<sup>526</sup>

§ 72. Where lessor is to repair.<sup>527</sup>—In general, where the landlord covenants to repair, he is not liable for a failure to repair without reasonable notice of the defects, as the latter to make premises safer than they were at the time of letting, or to warn them or any of them of dangers which were then discoverable by the lessee. *Angevine v. Hewitson*, 235 Mass. 126, 129.

<sup>522</sup> *Palmigiani v. D'Argenio*, 234 Mass. 434; *Fiorntino v. Mason*, 233 Mass. 451; *Baum v. Ahlborn*, 210 Mass. 336, 338.

<sup>523</sup> *Kirby v. Tirrell*, 236 Mass. 170.

<sup>524</sup> *Palmigiani v. D'Argenio*, 234 Mass. 434.

<sup>525</sup> *Boston v. Gray*, 144 Mass. 53; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47.

The covenant is valuable when the tenant occupies only a part of the premises so that the landlord may repair the whole.

<sup>526</sup> *Foster v. Peyser*, 9 Cush. 242. See *infra*, § 187.

<sup>527</sup> *Cp. infra*, §§ 198, 199.

are peculiarly within the knowledge of the tenant;<sup>528</sup> and therefore mere proof of want of repair is not evidence of the lessor's negligence.<sup>529</sup>

The liability of a landlord who agrees to make general repairs is for a contract to do certain work and no more; and the damages will ordinarily be the cost of making the repairs.<sup>530</sup> In such a case the tenant is not relieved from looking out for himself and refraining from using the premises if they are dangerous.<sup>531</sup>

The landlord may, however, agree to repair without notice,<sup>532</sup> and a covenant to put the premises in good condition and "so to maintain them for and during the term of" the lease, has been held to be such an agreement.<sup>533</sup> Such an agreement has the same effect as if the premises were like, *e. g.*, common steps and in the control of the landlord, while actually in the possession of the tenant.<sup>534</sup>

Where a landlord agrees to keep a tenement "in repair and safe to live in" it becomes his duty to keep the premises in repair on his own responsibility, without notice from the tenant of defective conditions, and without request to make repairs.<sup>535</sup>

<sup>528</sup> *Marley v. Wheelwright*, 172 Mass. 530; *Hutchinson v. Cummings*, 156 Mass. 329; *Galvin v. Beals*, 187 Mass. 250; *Cummings v. Ayer*, 188 Mass. 292; *Rice v. Boston University*, 191 Mass. 30. See *Tuttle v. Gilbert Manuf. Co.*, 145 Mass. 169, 175; *Domenicis v. Fleischer*, 195 Mass. 281; *Miles v. Janvrin*, 196 Mass. 431; *Miles v. Janvrin*, 200 Mass. 514; *Stewart v. Cushing*, 204 Mass. 154, 157; *Mills v. Swanton*, 222 Mass. 557.

*Cp. Mackey v. Lonergan*, 221 Mass. 296.

<sup>529</sup> *Mills v. Swanton*, 222 Mass. 557.

<sup>530</sup> *Miles v. Janvrin*, 200 Mass. 514.

<sup>531</sup> *Miles v. Janvrin*, 200 Mass. 514, 516, per Knowlton, C. J.

<sup>532</sup> *Cummings v. Ayer*, 188 Mass. 292; *Miles v. Janvrin*, 196 Mass. 431; *Miles v. Janvrin*, 200 Mass. 514.

<sup>533</sup> *Hayden v. Bradley*, 6 Gray, 425; *Miles v. Janvrin*, 200 Mass. 514.

*Cp. Lane v. Raynes*, 223 Mass. 514.

A lessor covenanted that if during the term any portion of the premises should be taken by eminent domain the amount awarded as damages should, after putting the buildings in condition, be paid to the lessor. A portion of the land and building was taken before the commencement of the term. It was held that, the land not having been taken during the term, the lessees could neither maintain an action against the lessor upon the covenant for not repairing, nor an action for money received by him and not expended on repairs. *Prager v. Bancroft*, 112 Mass. 76.

<sup>534</sup> *Miles v. Janvrin*, 196 Mass. 431. *Cp. Mackay v. Lonergan*, 221 Mass. 296.

<sup>535</sup> *Crowe v. Bixby*, 237 Mass. 249.

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Whether the agreement is one to "repair" or to "maintain in a safe condition" is to be determined by all the evidence in each case.<sup>536</sup>

When a dwelling house is let and the landlord agrees to keep the premises safe, it is not intended that they are to be kept in this condition of safety for all purposes and for every kind of service, nor that all parts of the premises are to be kept in this condition when it is apparent that certain parts are not designed for use by the tenant, as the tenement which is occupied and dwelt in.<sup>537</sup>

The lessor cannot avoid liability upon his covenant to repair by showing that the necessity for repair was partly occasioned by the negligence of the lessee.<sup>538</sup> He is bound "to do all that ordinary sagacity, prudence and foresight can do to keep the premises in good repair and condition."<sup>539</sup>

But even where the lessor is bound by custom or express covenant to repair, and by his failure to do so the premises become uninhabitable or unfit for the purposes for which they were leased, the tenant has no right to quit the premises or to refuse to pay rent according to his covenant, but his only remedy is by action for damages.<sup>540</sup> When the lessor is to make repairs and the lessee to pay the lessor the whole or a part of the cost, an eviction is no defence to an action by the lessor;<sup>541</sup> and, in general, where the failure to repair does not cause an eviction, the lessee's covenant to pay rent and the lessor's covenant to repair are entirely independent.<sup>542</sup> Where the tenant is to make the repairs, the fact that the landlord at his request makes certain repairs voluntarily,

<sup>536</sup> *Miles v. Janvrin*, 196 Mass. 431. *Cp.* *Miles v. Janvrin*, 200 Mass. 514.

In *Leavitt v. Fletcher*, 10 Allen, 119, the covenant of the lessor was "to make all necessary repairs on the outside of the building."

<sup>537</sup> *Eisenhauer v. Ceppi*, 238 Mass. 458, 461.

<sup>538</sup> *Flynn v. Trask*, 11 Allen, 550. In this case the tenant's cellar was flooded and the lessor offered evidence that someone had altered the course of water from a conductor so that it burrowed into the ground near the cellar.

<sup>539</sup> *Flynn v. Trask*, 11 Allen, 550.

<sup>540</sup> *Kramer v. Cook*, 7 Gray, 550; *Leavitt v. Fletcher*, 10 Allen, 119, 121; *Royce v. Guggenheim*, 106 Mass. 201; *Ware v. Hobbs*, 222 Mass. 557. See also *infra*, § 254.

<sup>541</sup> *Anthony v. Travis*, 148 Mass. 53.

<sup>542</sup> *Royce v. Guggenheim*, 106 Mass. 201, 203; *Leavitt v. Fletcher*, 10 Allen, 119, 121. *Cp.* *Kramer v. Cook*, 7 Gray, 550, 553.

does not impose any liability on the landlord for subsequent injuries arising from defects,<sup>543</sup> and is not an admission of the landlord's liability or obligation to repair.<sup>544</sup>

Where repairs are made by the landlord to induce the tenant to continue his occupancy of the premises, such repairs are made for a consideration and are not gratuitous.<sup>545</sup>

If the landlord undertakes gratuitously to make repairs, and personal injuries result therefrom, not causing death, he is not liable for ordinary negligence in such undertaking, but only for gross negligence, and then only to the person with whom he makes the gratuitous undertaking.<sup>546</sup>

If a lessee is obliged to pay damages under the employers' liability act, to one of his employees, for an injury caused by the failure of the lessor to keep certain lighting apparatus in safe repair, the lessor is liable if at all at common law, without reference to the amount of the judgment.<sup>547</sup>

§ 73. Where lessee is to repair.—The usual covenant of the lessee is to "keep all and singular the said premises in such repair as the same are in at the commencement of said term or may afterwards be put in by the lessor or his heirs or assigns, reasonable use and wearing thereof and damage by fire or other unavoidable casualties only excepted," and at the end of said term to "peaceably deliver up to the lessor or his heirs or assigns the said premises together with all future erections or additions upon or to the same in such repair as aforesaid and in good and tenantable order and condition."<sup>548</sup>

Neither of these covenants compels the lessee to keep the premises in tenantable repair during the term, and the second one is satisfied if the premises are in that condition when vacated.<sup>549</sup>

<sup>543</sup> *McKeon v. Cutter*, 156 Mass. 296; *Galvin v. Beals*, 187 Mass. 250; *Phelan v. Fitzpatrick*, 188 Mass. 237.

<sup>544</sup> *Dalton v. Gibson*, 192 Mass. 1; *Phelan v. Fitzpatrick*, 188 Mass. 237; *McLean v. Fiske Wharf Co.*, 158 Mass. 472; *McKeon v. Cutter*, 156 Mass. 296, 298; *Kearnes v. Cullen*, 183 Mass. 298.

<sup>545</sup> *Bergeron v. Forest*, 233 Mass. 392, 400.

<sup>546</sup> *Bergeron v. Forest*, 233 Mass. 392, 398.

<sup>547</sup> *Consolidated Machine Co. v. Bradley*, 171 Mass. 127.

<sup>548</sup> *Ball v. Wyeth*, 8 Allen, 275; *Phillips v. Stevens*, 16 Mass. 238; *Watriss v. Cambridge National Bank*, 130 Mass. 343; *Poor v. Sears*, 154 Mass. 539, 542; *Holbrook v. Chamberlin*, 116 Mass. 155; *Nash v. Webber*, 204 Mass. 419; *Weeks v. Wilhelm-Dexter Co.*, 220 Mass. 589.

<sup>549</sup> *Hill v. Hayes*, 199 Mass. 411, 416.



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Such a covenant applies only to the premises demised, and therefore a lessee is not liable for damage to a common stairway, whether done by himself or by his sublessee.<sup>550</sup>

A provision that the lessee shall deliver up the premises in "as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are," *i. e.*, with no mention of demolishing additions or alterations, imposes upon the lessee the obligation to make whatever repairs may be necessary in order that at the end of the term the estate may conform to the standard at the time fixed in the lease.<sup>551</sup> And, where there is a further provision as to alterations with the consent of the lessor, showing that alterations are contemplated, such a provision manifests "an intent that the building at the expiration of the term shall be returned to the lessor in a state of repair as good as it was in at the beginning as to both its original construction and also such changed state as it may be transformed into in accordance with the express terms of the lease."<sup>552</sup>

But such a provision does not require the lessee to restore the premises to the condition in which they were originally; and differs from provisions requiring redelivery in "the same shape and condition" or in a "like condition" or in the "same state."<sup>553</sup> Thus, where a landlord gives the tenant to understand that he has no objection to alterations, and the tenant with the landlord's knowledge makes extensive alterations, the landlord cannot claim to be reimbursed for the expense of restoration.<sup>554</sup> Similarly, where a lessee, with the consent of the lessor, added certain fixtures and left them at the end of the term, it was held that the lessor could not recover the cost of removing them in order to make the premises rentable.<sup>555</sup>

<sup>550</sup> Tremont Theatre Amusement Co. *v.* Bruno, 225 Mass. 461. See Flanagan *v.* Welch, 220 Mass. 186; Fitzsimmons *v.* Hale, 220 Mass. 461.

<sup>551</sup> Cawley *v.* Jean, 218 Mass. 263, 269; Jaques *v.* Gould, 4 Cush. 384, 388.

<sup>552</sup> Cawley *v.* Jean, 218 Mass. 263, 269, per Rugg, C. J.

<sup>553</sup> Cawley *v.* Jean, 218 Mass. 263, 269. *Cf.* Pfister & Vogel Co. *v.* Fitzpatrick Shoe Co., 197 Mass. 277; Perry *v.* Mott Iron Works Co., 207 Mass. 501, 505. As to the measure of damages where restoration is provided for, see *infra*, §§ 74, 82.

<sup>554</sup> Pfister & Vogel Co. *v.* Fitzpatrick Shoe Co., 197 Mass. 277.

<sup>555</sup> Perry *v.* Mott Iron Works Co., 207 Mass. 201, 205. In this case, the covenant besides forbidding alterations without the consent of the lessor provided: "that the lessee may make such alterations and additions within said leased premises as may be necessary for his business, and



And evidence as to the contents of a preliminary agreement for the lease, which provided that the lessee should remove such fittings, is inadmissible.<sup>556</sup>

A provision that the lessee shall deliver up the premises in "as good order and condition . . . as the same now are," refers to the date of the lease, which was the beginning of the term, and not to the date of its actual execution, where this was a later date and where alterations had meanwhile been made.<sup>557</sup> The word "now" refers to the beginning of the term, even when that is different from the date of the lease.<sup>558</sup>

But a covenant that the lessee "will at the expiration of this lease remove all rubbish . . . and peacefully yield up the premises . . . clean and in good repair, order and condition in all respects" is not inconsistent with the usual covenant as to redelivery in the same condition as the premises were in at the beginning of the lease or might have been put in subsequently.<sup>559</sup> And, therefore, where a paint manufacturer left the floors covered with a sticky deposit which had accumulated during previous leases to him as lessee, he was held liable for putting the floors in good order.<sup>560</sup>

When the lessee is to make all repairs of whatsoever nature, he is obliged to make alterations in connection with an elevator caused by a change in the building law near the end of the term;<sup>561</sup> and if he fails to do so, the lessor may make them and recover the cost.<sup>562</sup>

The following is another form of the covenant as to repairs:

"The lessors may enter to view and make improvements, and expel the lessee if he shall fail to pay the rent as aforesaid or the percentage on repairs and improvements hereinafter mentioned, or make or suffer any strip or waste thereof. The lessee agrees that all repairs shall be made by him and

may remove at the termination of this lease such tiling and special fittings as have been put in at his own expense, provided he puts the premises in as good repair as they were in at the beginning of said term."

<sup>556</sup> *Perry v. Mott Iron Works Co.*, 207 Mass. 501, 505.

<sup>557</sup> *Cawley v. Jean*, 218 Mass. 263.

<sup>558</sup> *Holbrook v. Chamberlin*, 116 Mass. 155; *Cawley v. Jean*, 218 Mass. 263, 268.

<sup>559</sup> *Weeks v. Wilhelm-Dexter Co.*, 220 Mass. 589.

<sup>560</sup> *Ibid.*

<sup>561</sup> *Baker v. Horan*, 227 Mass. 415.

<sup>562</sup> *Ibid.*

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at his expense except as hereinafter provided. The lessors may make such repairs and improvements as the lessee shall agree to with them, which repairs and improvements shall be at the expense of the lessors, and the lessee agrees to pay to the lessors ten per cent per annum on the cost of such repairs and improvements agreed on as aforesaid, the said ten per cent to be paid from the time said improvements and repairs are completed until the end of said term, and to be paid at the times reserved for payment of the rent as aforesaid.”<sup>563</sup> Under such a covenant, if, after the date of the lease and before the beginning of the term, the lessee makes certain repairs in consideration of being allowed to occupy for a certain time before the term begins, these repairs are in effect made by the lessor, and the lessee is liable to keep the premises good in those respects.<sup>564</sup>

It is not infrequent to have a clause in a lease similar to the following:

“All property of whatever kind that may be on the premises shall be at the sole risk of the lessee, or those claiming under or through him, and the lessor or his heirs or assigns shall not be liable to the lessee or any other person for any

<sup>563</sup> *Anthony v. Travis*, 148 Mass. 53, 54.

In *Anthony v. N. Y., P & B. R. R. Co.*, 162 Mass. 61, the covenant was as follows: “And in addition to the rents to be paid as aforesaid the said party of the second part agrees to keep all the said buildings, appurtenances and improvements in good repair, and also to maintain an amount of insurance upon all the said buildings sufficient to repair or replace them in case of destruction or damage by fire. Said repair and insurance to be at the cost of said party of the second part, and it is expressly understood and agreed by said party of the second part that, if any building shall be destroyed or damaged by fire, it shall be rebuilt or repaired by said party at once, unless this requirement shall be waived by the party of the first part, in which case all moneys received by and in the hands of the party of the second part for insurance on the damaged or destroyed property shall be promptly paid to said party of the first part, their heirs or assigns. If said party of the second part shall desire to alter or remove any building, appurtenances or improvements on said premises, or to place any new building, appurtenances or improvements upon the same, it shall be lawful and proper to do so, provided that all such operations shall in no wise impair the value of said premises, its buildings, appurtenances and improvements as they now exist.”

<sup>564</sup> *Holbrook v. Chamberlin*, 116 Mass. 155.

injury, loss or damage, to any person or property, on the premises." <sup>565</sup>

Unless the exception as to fire, etc., is inserted, the lessee must rebuild if the buildings be destroyed by fire or other accident not amounting to an unavoidable casualty, though it happen entirely without his fault, <sup>566</sup> unless the term of the lease has expired. And apparently even under the covenant as to redelivery alone, when nothing is said as to who shall make repairs during the term, such repairs must be made by the lessee. <sup>567</sup> But if, in such a covenant, there is an exception of "reasonable use and wearing thereof and other unavoidable casualties," the exception applies to redelivery as well as to maintenance. <sup>568</sup>

Premises destroyed by fire must be rebuilt within a reasonable time; <sup>569</sup> but it seems that, as to other repairs, it is sufficient if they be made at any period during the term, provided the delay in repairing occasions no injury to the building, and does not otherwise prejudice the lessor. <sup>570</sup>

The covenant to repair runs with the land, and binds an assignee of a part of the premises as well as when the whole is transferred. <sup>571</sup>

The leaving of rubbish on the premises is not a breach of the covenant as to redelivery; <sup>572</sup> nor, on the other hand, does the covenant to deliver up "all future erections or additions"

<sup>565</sup> Rolfe v. Tufts, 216 Mass. 563.

<sup>566</sup> Phillips v. Stevens, 16 Mass. 238; Ainsworth v. Mt. Moriah Lodge, 172 Mass. 257. Cp. Fowler v. Bott, 6 Mass. 63; Adams v. Nichols, 19 Pick. 275.

The same construction was placed upon similar language, in a devise of an estate upon condition, in Tilden v. Tilden, 13 Gray, 103.

"It has been the established rule of the common law for ages that an express covenant to repair binds the covenantor to make good any injury which human power can remedy, even if caused by storm, flood, fire, inevitable accident or the act of a stranger." Leavitt v. Fletcher, 10 Allen, 119; Bigelow v. Collamore, 5 Cush. 226, 231.

The tenant is entitled to cut a reasonable quantity of wood on a farm with which to make repairs. Hubbard v. Shaw, 12 Allen, 120.

<sup>567</sup> Jaques v. Gould, 4 Cush. 385.

<sup>568</sup> Ball v. Wyeth, 8 Allen, 275.

<sup>569</sup> Tilden v. Tilden, 13 Gray, 103, 109.

<sup>570</sup> Atkins v. Chilson, 9 Met. 52, 63, per Dewey, J.

<sup>571</sup> 1 Taylor, Landl. & Ten., 9th ed., §§ 357, 365.

<sup>572</sup> Thorndike v. Burrage, 111 Mass. 531.

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deprive the tenants of the right to remove trade fixtures, much less personal property, put by them upon the premises during the term.<sup>573</sup> Under a clause providing that, if the premises are destroyed or damaged by fire, the rent shall be suspended or abated until the premises are put into proper condition for use by the lessor, and where under the lease the lessee takes an estate in the land, any building which the lessor may erect after a fire will enure to the benefit of the lessee.<sup>574</sup>

The covenant may be that the lessee is to make the repairs, but the lessor is to be responsible for their cost, and the same shall be deducted by the lessee from the rent he pays.<sup>575</sup>

Where the tenant covenants "to do all the necessary repairs" in a demise of an entire building, and erects and maintains a wooden canopy over a doorway, without a gutter or conductor to prevent the drippings therefrom falling on the sidewalk, and the formation of a ridge of ice thereon, such tenant is liable, upon proper notice, to a traveler injured by falling from that cause.<sup>576</sup>

§ 74. Damages for breach of covenant.<sup>577</sup>—"As a general rule the measure of damages for the breach of a lessee's covenant to keep in repair and to surrender the demised premises at the end of the term in as good order and condition as they are at the beginning of it, is the sum it would cost to repair the premises and put them in the condition they ought to be in. When the lessor sues on the covenant pending the lease, and so before he is entitled to possession of the premises, the damages may be limited to the diminution in the market value of his estate. But when the action is brought after the

<sup>573</sup> *Holbrook v. Chamberlin*, 116 Mass. 155, 162; *Ryder v. Faxon*, 171 Mass. 206 (building). *Cp.* *Perry v. Mott Iron Works Co.*, 207 Mass. 201, 205.

<sup>574</sup> *Rogers v. Snow*, 118 Mass. 118, 124.

<sup>575</sup> In *Burnham v. Roberts*, 103 Mass. 379, the wording of such a covenant was as follows: "I do hereby agree with said R. that he may make repairs upon said premises during said term, and that I will pay towards such repairs the sum of \$—— in the whole, he to retain that sum from the rent to grow due upon said lease from time to time as the same shall have been expended by him in such repairs. The lessee to exhibit bills as vouchers, satisfactory to the lessor."

<sup>576</sup> *Stefani v. Freshman*, 232 Mass. 354, 357.

<sup>577</sup> See also *infra*, §§ 81, 82.

end of the term, the measure of damages is still held to be such a sum as will put the premises in the condition in which the tenant is bound to leave them."<sup>578</sup>

A covenant to repair a certain "building" in a lease covering several buildings will ordinarily be held to apply to all the buildings demised, especially where the word "buildings" occurs in a duplicate of the lease.<sup>579</sup>

§ 75. Underletting and assignment.<sup>580</sup>—This is usually a covenant that the lessee and his executors, administrators and assigns "will not without the consent in writing of the lessor or of his heirs or assigns, assign this lease, nor underlet the whole or any part of said premises." Sometimes "nor permit any other person or persons to occupy or improve the same" is added.<sup>581</sup>

A transfer of the lessee's entire interest for the whole term in whole or a part of the estate is an *assignment*, while a transfer of less than the entire interest, or of the entire interest for less than the whole term even of the whole estate, is a *sublease*.<sup>582</sup> It must be in writing and under seal.<sup>583</sup>

As we have seen above<sup>584</sup> all leases are assignable in the

<sup>578</sup> Gray, C. J., in *Watriss v. Cambridge National Bank*, 130 Mass. 343. In this case, the damages for a removal of fixtures were held to be the sum required to restore the fixtures, allowing for reasonable use and wear, and for the increase in value by substituting new material for old. *Cawley v. Jean*, 218 Mass. 263, 270; *Gulesian v. St. James Amusement Co.*, 238 Mass. 182.

<sup>579</sup> *Leavitt v. Fletcher*, 10 Allen, 119.

<sup>580</sup> See also *supra*, §§ 42-55, especially, §§ 43-49, 54. As to forfeiture for breach of this covenant, see *infra*, §§ 126, 127.

See generally as to these covenants, 7 Am. Law Rev. 240 (1872), where the Mass. cases are commented upon.

<sup>581</sup> *Austin v. Harris*, 10 Gray, 296; *Marion St. Garage Co. v. Sugden*, 229 Mass. 130, 133. *Cp.* 7 Am. Law Rev. 240, 250.

This clause was held in *Peaks v. Cobb*, 197 Mass. 554, to refer to a possession which would enable one to maintain trespass against an intruder; "not to add another kind of prohibited occupation to that previously forbidden, but to prevent the tenant from suffering or permitting a subtenancy, as well as from actively creating it. It does not, therefore, forbid letting rooms to lodgers. *Peaks v. Cobb*, 197 Mass. 554; *Stanton v. Allen*, 32 S. Car. 587. *Cf.* *White v. Maynard*, 111 Mass. 250.

<sup>582</sup> *Supra*, § 42.

<sup>583</sup> *Winnisimmet Trust v. Libby*, 232 Mass. 491.

<sup>584</sup> *Supra*, § 42.

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absence of this covenant; and even if the covenant be inserted the lessee's assigns are not bound unless named.<sup>585</sup>

If the estate is held on condition that none of the covenants be broken, an assignment without the consent of the lessor terminates the lessee's estate; and the assignee is not bound to accept an assignment not assented to and is not liable to pay therefor. It is the business of the lessee who offers to assign his term, to get such assent and tender a good assignment.<sup>586</sup> On the other hand, as between the lessee and the proposed assignee or sublessee, the lessee can fall back on the prohibition of the covenant as a defence, if an attempt is made to specifically enforce the contract to assign, although he may be liable in damages for breach of contract.<sup>587</sup>

Whether the covenant not to underlet forbids an assignment by the lessee seems somewhat in doubt; probably in this Commonwealth it does.<sup>589</sup> The covenant not to assign forbids subleases for the whole residue of the term, though

<sup>585</sup> *Dumpor's Case*, 4 Co. 119.

<sup>586</sup> *Austin v. Harris*, 10 Gray, 296. See *Putnam v. Grace*, 161 Mass. 237, holding that the purchaser of an unexpired term is not bound to accept an assignment without the lessor's assent, and that if he be not so bound at the time of filing a bill for specific performance, he cannot be made to take it, though afterward the lessor is ordered to assent to the assignment by a decree of court.

See *supra*, § 45, and *infra*, § 113.

<sup>587</sup> *Milkman v. Ordway*, 106 Mass. 232, 260. *Cp. Ellis v. Small*, 209 Mass. 147.

<sup>589</sup> *Woodfall, Landl. & Ten.*, 16th ed. (1898) 699; *Wood, Landl. & Ten.*, 2d ed., 714. *Greenaway v. Adams*, 12 Ves. 395. In *Blake v. Sanderson*, 1 Gray, 332, the covenant of the lessee was not to "lease nor underlet, nor permit any other person or persons to occupy or improve the premises." The lessee made an assignment of his interest. It was held that in an action for rent the assignees who had entered under the assignment were estopped to dispute its validity. The opinion appears to assume that assigning was forbidden by the covenant, and the same is true of *Shattuck v. Lovejoy*, 8 Gray, 204. See also *Shumway v. Collins*, 6 Gray, 227; *Bemis v. Wilder*, 100 Mass. 446, in which, however, the point was not expressly decided. See also *O'Keefe v. Kennedy*, 3 Cush. 325. Mr. Taylor (§ 403) criticizes these cases and states as law that a covenant against underletting does not preclude assignment, and a covenant against assignment does not preclude underletting. In accord with Taylor are 24 Cyc. 974; *Gear, Landl. & Ten.*, § 93; *Field v. Mills*, 33 N. J. L. 254; [1899] 1 Ir. 113; *Lynde v. Hough*, 27 Barb. 415.

upon different terms from those in the original lease;<sup>500</sup> but not an underlease strictly so called.<sup>501</sup>

There are certain cases where the covenant is not operative. Thus it may be waived by the lessor, and acceptance of rent by him from the assignee of the lessee is evidence of such waiver.<sup>502</sup> In the case of an assignment by operation of law, the covenant does not apply, and affords no defence against the assignee, even though the process of law be invoked by the lessee, in the absence of fraud. Colt, J., expresses it thus: "It is well settled that an assignment by operation of law passes the estate discharged of the covenant to the assignee; and this would seem to be so where the transfer arises from voluntary proceedings in insolvency as distinguished from proceedings *in invitum*, and where there is no indication that the proceedings are colorable merely for the purpose of effecting the transfer in fraud of the lessor."<sup>503</sup> Also, where the lessee

<sup>500</sup> Woodfall, Landl. & Ten., 16th ed. (1898) 699, citing *Greenaway v. Adams*, 12 Ves. 395; *Foa, Landl. & Ten.*, 2d ed., 210; *Wood, Landl. & Ten.*, 2d ed., 714.

<sup>501</sup> *Wood, Landl. & Ten.*, 2d ed., 714; 1 *Taylor, Landl. & Ten.*, 9th ed., § 403; 2 *Platt on Leases* (1847) 259; *Woodfall, Landl. & Ten.*, 16th ed. (1898) 699; *Foa, Landl. & Ten.*, 2d ed. (1895) 208; *Gear, Landl. & Ten.* (1888), § 93; 24 *Cyc.* 974; *Crusoe v. Bugby*, 2 W. Bl. 766, 3 Wils. 234; *Kinnersley v. Orpe*, 1 Dougl. 183; *Brewer v. Hill*, 1 Austr. 413; *Church v. Brown*, 15 Ves. 295; *Jalabut v. Chandos*, 1 Eden, 372; *Halford v. Hatch*, 1 Dougl. 183; *Jackson v. Silvernail*, 15 Johns. 278; *Jackson v. Harrington*, 17 Johns. 66; *Hargrave v. King*, 5 Ire. Eq. 430; *Copeland v. Parker*, 4 Mich. 660; *Laduke v. Mark*, 47 Mich. 158.

<sup>502</sup> *Porter v. Merrill*, 124 Mass. 534; *Carpenter v. Pocasset Mfg. Co.*, 180 Mass. 130. *Cp. infra*, §§ 118, 127; *Marion St. Garage Co. v. Sugden*, 229 Mass. 130.

"It was a condition for the benefit of the lessors which they might waive, and did waive by recognizing the assignee as their tenant and receiving rent of him as such. By such assignment and acceptance of the lease, the defendant is bound to the performance of its conditions; and his liability for rent is to be governed by the terms of the lease and not restricted to actual occupation." *Blake v. Sanderson*, 1 Gray, 332, per Thomas, J.

<sup>503</sup> *Bemis v. Wilder*, 100 Mass. 446 (insolvency); *Squire v. Learned*, 196 Mass. 134 (bequest); *Smith v. Putnam*, 3 Pick. 221; *Weil v. Raymond*, 142 Mass. 206 (attachment and execution). This is especially true when a lease runs to personal representatives and to persons "having their estate in the premises."

So also *Parker, C. J.*, in *Smith v. Putnam*, 3 Pick. 221: "The general



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has, with the consent of the lessor, assigned to a third person, a reassignment to him by such person is not obnoxious to this covenant.<sup>594</sup> These covenants are not broken by letting rooms for lodgings under such conditions that the lodgers acquire no interests as tenants.<sup>595</sup> So allowing a tailor and a bootblack to occupy temporarily a trifling part of the premises, amounts to only a revocable license.<sup>596</sup>

§ 76. **Covenant of fitness for occupation.**—A covenant that “the owner shall not be called upon or liable for any repairs whatsoever on said premises during the term; the house being now in perfect order” is not a covenant that the house is fit for habitation.<sup>597</sup> In regard to implied covenants of fitness for occupation or for a particular purpose, the same principles apply in the cases of leases as of other tenancies for which see *infra*, §§ 187–197.

§ 77. **Quiet enjoyment.**<sup>598</sup>—As we shall see elsewhere,<sup>599</sup> there is an implied covenant for quiet enjoyment arising from the fact of tenancy, and therefore the express covenant is perhaps not necessary, but it is customary to have it included in a lease. A covenant that the lessee shall “hold and occupy” amounts to a general covenant for quiet enjoyment.<sup>600</sup>

The covenant applies, of course, only to the premises actually included in the demise;<sup>601</sup> and is strictly limited by the

principle to be deduced from the cases is, that covenants not to assign, transfer, etc., are broken only by a voluntary transfer by the lessee; that sales on execution, the judgment being *in invitum*, are no breach; though if suffered for the purpose of evading the force of the covenants they shall be considered a breach.” *Weil v. Raymond*, 142 Mass. 206, 213.

<sup>594</sup> “By the lease itself the lessor consents to take the lessee as his tenant for the full term mentioned in the lease. This consent is available for any reassignment to the original lessee during the term.” *McCormick v. Stowell*, 138 Mass. 431.

<sup>595</sup> See *supra*, § 4; also *White v. Maynard*, 111 Mass. 250; *Peaks v. Cobb*, 197 Mass. 554; *Stanton v. Allen*, 32 S. Car. 587.

<sup>596</sup> *Albiani v. Evening Traveller Co.*, 220 Mass. 20, 25. Cf. *Lowell v. Strahan*, 145 Mass. 1.

<sup>597</sup> *Foster v. Peyser*, 9 Cush. 242. Cf. *Dutton v. Gerrish*, 9 Cush. 91, 93.

<sup>598</sup> See also *infra*, §§ 141–144.

<sup>599</sup> § 186.

<sup>600</sup> *Ellis v. Welch*, 6 Mass. 246.

<sup>601</sup> *Davis v. Atkins*, 9 Cush. 13 (case of filling flats and dock adjoining wharf).



terminable interest demised, having no bearing on the question when the interest may be ended.<sup>602</sup>

The covenant runs with the land, being a covenant *in futuro*.<sup>603</sup>

Where the tenant of an estate underlets by a written lease, and the landlord has demanded and received rent from the sublessee, the sublessor is not entitled to receive rent; for there has been a breach of the covenant for quiet enjoyment.<sup>604</sup>

It is not necessary that the tenant should set up a breach of the covenant in an action by the lessor for rent. He may maintain a cross action if he desires.<sup>605</sup>

§ 78. What are breaches of covenant.—There can be no breach of this covenant without an eviction.<sup>606</sup> The covenant extends to interruptions by those having lawful title<sup>607</sup> by virtue of rights existing at the time of the lease,<sup>608</sup> and where the lessor himself does some act changing the character and beneficial enjoyment of the premises, he is liable without proof of intent to disturb;<sup>609</sup> but, as we shall see later, he is not liable for mere non-feasance, where he has not covenanted to do the acts in question.<sup>610</sup>

The following have been held to be breaches of the covenant: Using machinery in such a manner as to defeat the purposes of the lease.<sup>611</sup> Diverting water from mill property leased.<sup>612</sup> An assertion of the right to possession or to be recognized as landlord by (1) lessor of tenant's lessor,<sup>613</sup> (2) purchaser from lessor of tenant,<sup>614</sup> (3) where tenant's lessor had no

<sup>602</sup> Hunnewell v. Bangs, 161 Mass. 132, 134. Cp. Brown v. South Boston Savings Bank, 148 Mass. 300, 304.

<sup>603</sup> Shelton v. Codman, 3 Cush. 318.

<sup>604</sup> Holbrook v. Young, 108 Mass. 83. See Casassa v. Smith, 206 Mass. 69.

<sup>605</sup> Riley v. Hale, 158 Mass. 240, 246. Cp. Hunt v. Brown, 146 Mass. 253, 255, 256; Fiske v. Steele, 152 Mass. 260, and cases cited.

<sup>606</sup> Callahan v. Goldman, 216 Mass. 238; International Trust Co. v. Schumann, 158 Mass. 287.

<sup>607</sup> Ellis v. Welch, 6 Mass. 246; Sherman v. Williams, 113 Mass. 481; Kimball v. Grand Lodge, 131 Mass. 59; Casassa v. Smith, 206 Mass. 69.

<sup>608</sup> Ellis v. Welch, 6 Mass. 246, 252.

<sup>609</sup> Sherman v. Williams, 113 Mass. 481, 485. See also *infra*, § 141.

<sup>610</sup> *Infra*, § 79.

<sup>611</sup> Dexter v. Manley, 4 Cush. 14.

<sup>612</sup> Hovey v. Newton, 11 Pick. 421.

<sup>613</sup> Holbrook v. Young, 108 Mass. 83.

<sup>614</sup> O'Connor v. Daily, 109 Mass. 235.

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right to make the lease,<sup>615</sup> (4) by a purchaser from the assignee of a mortgage prior to the lease.<sup>616</sup> Exclusion of tenant by the lessor leasing to other tenants.<sup>617</sup> Erection of chimneys by other lessees of lessor and allowing noise and smoke to escape into a building well which gave the tenant light and air.<sup>618</sup> Lessor taking down a building when he might have altered it, to comply with the building law.<sup>619</sup>

The fact that the acts constituting the breach complained of were done under a local building law or in compliance with the orders of the building inspector of a city is no defence, if the statute or the orders could have been complied with in some other way.<sup>620</sup> It is, however, sufficient justification for the tenant to prove a written agreement between the owner, himself and a builder whereby the erection of a new building upon the site was provided for, and to prove that the landlord made no objection to what the tenant did although aware of it.<sup>621</sup>

When the tenant is notified to quit the premises by one having a paramount title, he does not lose his remedy against his lessor if he goes without waiting for legal proceedings to be taken against him. This is especially true where his lessor consents to his leaving.<sup>622</sup>

**§ 79. What are not breaches of covenant.**—Under the covenant, the lessor does not contract against the acts of wrongdoers, for against the latter the tenant has his separate remedy.<sup>623</sup> And where there is an interruption by one who has merely a title to some chattel that happens to be upon

<sup>615</sup> *King v. Bird*, 148 Mass. 572.

<sup>616</sup> *Duncklee v. Webber*, 151 Mass. 408.

<sup>617</sup> *Riley v. Hale*, 158 Mass. 240.

<sup>618</sup> *Case v. Minot*, 158 Mass. 577.

<sup>619</sup> *Kansas Investment Co. v. Carter*, 160 Mass. 421.

<sup>620</sup> *Ibid.* *Cp.* *Taylor v. Plymouth*, 8 Met. 462, 465 (case of the pulling down of a building by officials during a fire).

<sup>621</sup> *Kansas Investment Company v. Carter*, 160 Mass. 421, in which the text of agreement is given.

<sup>622</sup> *King v. Bird*, 148 Mass. 572; *Holbrook v. Young*, 108 Mass. 83. See *George v. Putney*, 4 Cush. 351. *Cp.* as to deeds: *Hamilton v. Cutts*, 4 Mass. 349; *Sprague v. Baker*, 17 Mass. 586; *White v. Whitney*, 3 Met. 81, 89; *Whitney v. Dinsmore*, 6 Cush. 124, 128; *Hawes v. Shaw*, 100 Mass. 187.

<sup>623</sup> *Parsons, C. J.*, in *Ellis v. Welch*, 6 Mass. 246, 250; *Sherman v. Williams*, 118 Mass. 481; *Kimball v. Grand Lodge*, 131 Mass. 59.

the land, but no lawful interest in the realty, this is not a breach of covenant.<sup>624</sup>

Nor does the covenant cover interruptions by virtue of rights acquired after the letting.<sup>625</sup> Consequently, a taking of the premises or a part thereof by eminent domain is no breach of this covenant,<sup>626</sup> even though it is the landlord who sets the power of eminent domain in operation.<sup>627</sup>

A lessor cannot commit a breach of this covenant by mere non-feasance, where he has not covenanted to do the acts in question,<sup>628</sup> even though the acts, such as alterations, are ordered to be done by a public authority, such as an inspector of buildings.<sup>629</sup> So it is not a breach of this covenant for the landlord to make a formal entry upon the premises under claim of right to repossess them for breach of covenants by the tenant, unless the tenant yields and quits possession.<sup>630</sup> Nor is the bringing of a process to eject the tenant a breach, though final judgment therein be rendered for the tenant.<sup>631</sup> Nor is the action of the landlord in causing the tenant's license as a common victualler to be taken from him and in inducing the license commissioners to refuse him a license for the sale of liquors, although the landlord knew that the

<sup>624</sup> *Kimball v. Grand Lodge*, 131 Mass. 59.

<sup>625</sup> *Ellis v. Welch*, 6 Mass. 246, 252.

<sup>626</sup> *Ellis v. Welch*, 6 Mass. 246; *Parks v. Boston*, 15 Pick. 198, 205; *Goodyear, etc., Co. v. Boston Terminal Co.*, 176 Mass. 115; *Cornell-Andrews, etc., Co. v. Boston & Providence R. Co.*, 202 Mass. 585, 597.

<sup>627</sup> *Goodyear, etc., Co. v. Boston Terminal Co.*, 176 Mass. 115. "The law will keep the two characters of landlord and representative of the public power distinct, so far as necessary to preserve rights dependent upon its doing so." *Ibid.*, p. 118, per Holmes, C. J.

<sup>628</sup> *Taylor v. Finnigan*, 189 Mass. 568; *Roth v. Adams*, 185 Mass. 341; *Lumiansky v. Tessier*, 213 Mass. 182, 185. *Cp. Barnett v. Loud*, 226 Mass. 447.

<sup>629</sup> *Taylor v. Finnigan*, 189 Mass. 568; *Lumiansky v. Tessier*, 213 Mass. 182, 185.

<sup>630</sup> *International Trust Co. v. Schumann*, 158 Mass. 287. "Such an entry does not interrupt the tenant's occupation and does him no damage." Barker, J.

<sup>631</sup> *International Trust Co. v. Schumann*, 158 Mass. 287. "The process was not a malicious suit, and for it his costs as the prevailing party are the only remedy." Barker, J., p. 291, citing *White v. Dingley*, 4 Mass. 433; *Lindsay v. Larned*, 17 Mass. 190; *Fisher v. Barrett*, 4 Cush. 381, 384.

premises were of value to the tenant only for his business of a common victualler.<sup>632</sup>

Nor is it a breach for the lessor to notify subtenants not to pay rent to the lessee, or to collect rent from them, receipting in his own name; as there was no entry, and the tenants still remained tenants.<sup>633</sup>

Nor, where the landlord and tenant occupy adjoining offices in a suite, is the action of the landlord in gambling with cards, or inviting a disreputable woman to frequent his office who is obscene and insulting.<sup>634</sup>

Such entry and suit, if the tenant yields to them may be a breach of covenant, but otherwise are at most a mere trespass, for which the tenant can only recover damages in an action of tort.<sup>635</sup>

§ 80. Measure of damages for breach.—In actions for breach of this covenant, the measure of damages is the difference between the agreed rental and the actual value of the term, to which any rent paid during the period of exclusion should be added.<sup>636</sup> For the purpose of showing the actual value of the term covered by his lease, the lessee may put in other leases from the landlord to third persons covering portions of the same period, or even leases from the landlord's grantee to third persons. And the fact that rent was not paid under such leases does not affect the competency of the evidence, but is merely matter of comment for the jury.<sup>637</sup>

In *Dexter v. Manley*,<sup>638</sup> the instructions, which were approved by the higher court on exceptions, were stated by the reporter to be: "that neither the rent reserved, nor the amount of profits was the rule of damages; that where a lessee was entirely deprived of the use of the property leased, the

<sup>632</sup> *International Trust Co. v. Schumann*, 158 Mass. 287. These acts "had no tendency to interrupt and did not interrupt the tenant's possession." *Barker, J.*, citing *DeWitt v. Pierson*, 112 Mass. 8, 11; *Groustra v. Bourges*, 141 Mass. 7; *Stevens v. Pierce*, 151 Mass. 207.

*Cp. Lumiansky v. Tessier*, 213 Mass. 182, where a theatre license was revoked because of a failure of the lessee to make alterations.

<sup>633</sup> *Aguglia v. Cavischia*, 229 Mass. 263, 266.

<sup>634</sup> *Barnett v. Loud*, 226 Mass. 447.

<sup>635</sup> *International Trust Co. v. Schumann*, 158 Mass. 287.

<sup>636</sup> *Riley v. Hale*, 158 Mass. 240. For an action by a sublessee who was evicted by the original lessor, see *Casassa v. Smith*, 216 Mass. 500.

<sup>637</sup> *Ibid.*

<sup>638</sup> 4 Cush. 14, 21.

rule of damages was the value of the lease, or what the property would fairly rent for; that on this subject, the rent reserved, the amount of the business and the profits of it, were proper elements to be considered in estimating the damages; that there being only a partial disturbance of the plaintiff in the enjoyment of his lease, he was entitled only to a just proportion of the value of the lease, according to the extent of the injury; and that the jury should take into consideration the fact that the property was leased with the restriction expressed." So the fact that by its terms a lease is not assignable is a material element in estimating the damages.<sup>639</sup>

When the lessor delivers possession to the lessee of a part of the premises only, the measure of damages is the diminished value of the lease, if the lessee accepts the lease.<sup>640</sup> But in the absence of evidence that the landlord knew that the premises were to be put to a certain use, the tenant cannot recover damages for loss suffered in his business by the breach of covenant.<sup>641</sup> Interest may be recovered on the amount of the damages, from the time of the breach of covenant to the time of a finding or award by a jury or referee, and this amount is allowed as a portion of the damages.<sup>642</sup>

Where the covenantor has died, and the breach occurred in his lifetime and continued after his death, damages for the whole may be recovered in one action against his administrator.<sup>643</sup> See also Damages for Eviction, *infra*, § 144.

§ 81. Alterations and additions.<sup>644</sup>—This covenant is usually that "no alterations or additions shall be made to the premises without the written consent of the lessor."<sup>645</sup> Or "that neither they, nor others having their estate in the premises, shall or will make any alteration in, or addition in and to, the buildings on the said premises, or to the premises themselves, without the consent of the lessors being first obtained in writing allowing thereof."<sup>646</sup>

<sup>639</sup> Rice v. Baker, 2 Allen, 411.

<sup>640</sup> Townsend v. Nickerson Wharf Co., 117 Mass. 501. See Emmes v. Feeley, 132 Mass. 346.

<sup>641</sup> Townsend v. Nickerson Wharf Co., 117 Mass. 501.

<sup>642</sup> Hovey v. Newton, 11 Pick. 421.

<sup>643</sup> *Ibid.*

<sup>644</sup> See also *supra*, §§ 71-74.

<sup>645</sup> Atkins v. Chilson, 9 Met. 52; Browne v. Niles, 165 Mass. 276.

<sup>646</sup> Whitwell v. Harris, 106 Mass. 532.

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In one case the covenant was as follows: "The demised premises are to be fitted at the sole cost of the said lessee, and thereafter to be used as a bath establishment for Turkish and other baths under the limitations hereinafter set forth. The work of fitting up to be begun forthwith, and prosecuted without delay to completion, at such times and in such manner as shall not, by noise or otherwise, interfere with the use of the adjoining property as a theatre, and all changes and alterations to be made in a thorough and workmanlike manner."<sup>647</sup> A building was let "provided that said lessees erect, complete and finish, in a good and substantial and workmanlike manner, and in strict conformity and keeping with the plans and specifications of the architect, J. R., a new front to said stores at their own expense, the glass used in the same being of the best French plate double thick glass, similar to that used in the stores under the city hall." This provision as to putting in a certain quality of glass was held not to be a condition precedent to the vesting of the lessee's estate, and to call for glass of a fair sample of the quality specified.<sup>648</sup>

The covenant is not broken by the erection by the tenant of another building, upon the adjacent lot of another person which the tenant has leased, although the light and air are thereby shut off from the building leased, and although by the lease the right to close the windows on that side of the leased building is expressly reserved to the lessor;<sup>649</sup> and the lessor cannot object to the erection of such a building while the tenant is in possession of the premises.<sup>650</sup> But the erection of a small wooden building on a part of the lot leased is a breach of the covenant, although it could easily be removed and leave no trace.<sup>651</sup>

<sup>647</sup> *Lundin v. Schoeffel*, 167 Mass. 465.

The fact that a slight noise was made inadvertently at a time when it annoyed the lessor might be a ground of relief against forfeiture in equity under the head of accident. *Ibid.*

A delay of two months and a half in beginning the work of fitting up may be explained by the fact that the lessee was making contracts and doing preliminary work. *Ibid.*

See further, Remedy in Equity, *infra*, § 288.

<sup>648</sup> *Lowell Meeting-House v. Hilton*, 11 Gray, 407.

<sup>649</sup> *Atkins v. Chilson*, 9 Met. 52.

<sup>650</sup> *Atkins v. Chilson*, 7 Met. 398.

<sup>651</sup> *Whitwell v. Harris*, 106 Mass. 532. "We think it unimportant whether the structure should or should not be considered as one of those

Where the lessee has permission under his lease to make certain alterations for the purpose of his business, a clause as to redelivery in good order obliges him to restore the premises to their former condition, if the alterations are an injury to the premises; even though the building is immediately let to another tenant who finds the alterations useful, and though the landlord gets as good a rent as he could have got with the building in its former condition.<sup>652</sup>

But a covenant to put the leased premises "in as good repair as they were at the beginning of said term" does not require a tenant to remove trade fixtures, although in order to make the premises rentable the lessor is obliged to have them removed.<sup>653</sup>

Unless the alterations are of such a nature as to be a substantial injury, the lessor cannot be enjoined in equity.<sup>654</sup> "The test in such a case is not alone whether a material injury

trade fixtures, which, in the absence of any stipulation to the contrary, the tenant might lawfully remove before the expiration of his term. The fact that it could be removed without leaving any permanent traces that it had ever been on the premises does not touch the question. The same thing might perhaps have been said if it had been built of more permanent materials. . . . If it had been placed there by the owner of the fee, it would have been in its general character and use, and in the mode of its annexation to the estate, a part of the freehold and realty. It is difficult to see what could be an alteration or addition 'to the premises themselves' if a new building of such a description and used in such a manner [for a shop and workroom] was not." Per Ames, J.

<sup>652</sup> *Re Jewell*, 18 N. B. R. 383 (N. Y.); *Rogers v. Snow*, 118 Mass. 118, 124.

<sup>653</sup> *Berry v. J. L. Mott Iron Works Co.*, 207 Mass. 501. *Cp. Rogers v. Snow*, 118 Mass. 118; *Pfister & Vogel Co. v. Fitzpatrick Shoe Co.*, 197 Mass. 277, and *supra*, § 73.

<sup>654</sup> *Browne v. Niles*, 165 Mass. 276. Barker, J., states the facts, p. 278: "In two floors of the leased building the defendants have cut apertures three and a half feet wide by nine feet long, removing the cross timbers and flooring, and covering the apertures by trap doors with hinges, and using the apertures to give passage to articles raised and lowered by a tackle and fall. . . . Such means of strengthening the floors have been taken as to leave them as strong as ever. The making of the apertures is not shown to have increased the fire risk or the cost of insurance, or to have in any way lessened the value of the building, or its safety, or to have injured the plaintiffs. If the making of the apertures was a violation of the terms of the lease, the plaintiffs have not only their action for breach of contract, but their right to terminate the defendant's estate."



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is done to the building, but whether it is altered in a material manner, and to an extent beyond what is fairly implied from the terms of the original contract of letting.”<sup>655</sup>

The words “alteration” and “addition” do not apply to the repairing of a defect, and this covenant is no defence to the ordinary liability to third persons for injuries occasioned by defects in the premises.<sup>656</sup> On the same principle, if a lessor notifies his lessee that he enters under the lease for breach of this covenant, he cannot sustain his action by showing a failure to keep the premises in repair.<sup>657</sup>

An agreement for alterations and additions, made subsequently to an agreement for a lease, but as a modification of an original plan of building the structures to be leased, is so connected with the original agreement as to be inseparable from it; and, if the agreement for the lease is void under the statute of frauds, the agreement as to alterations is void also.<sup>658</sup>

A lease always carries with it an implied covenant on the part of the lessor not to make any alterations in the premises which would substantially defeat the object of the lease.<sup>659</sup>

But there may be an express permission for the lessor to make alterations. Thus, where a lease of a basement provided that the lessors might “introduce additional machinery, pipes, wires or fixtures, if they should elect to do so,” they can place steam and water pipes in the basement during the term.<sup>660</sup>

A lessor is not liable for alterations unless made by his authority or consent, express or implied.<sup>661</sup> But where there is a sublease, providing against alterations without the consent of the sublessor, the original lessor has no power to consent to alterations by the sublessee, and the latter will be enjoined.<sup>662</sup>

Under an express covenant to make alterations or repairs, the landlord does not consent to such alterations or repairs, within the meaning of the law giving a mechanic’s lien upon

<sup>655</sup> *Essex Lunch, Inc. v. Boston Lunch Co.*, 229 Mass. 557, 560.

<sup>656</sup> *Boston v. Worthington*, 10 Gray, 496 (case of a cellarway unprotected by a railing as required by city ordinances). *Cp. McDonough v. Gilman*, 3 Allen, 264 (as to liability for nuisance). See *infra*, §§ 334–339.

<sup>657</sup> *Atkins v. Chilson*, 9 Met. 52.

<sup>658</sup> *Bacon v. Parker*, 137 Mass. 309.

<sup>659</sup> See *infra*, § 198.

<sup>660</sup> *Arafe v. Howe*, 228 Mass. 47.

<sup>661</sup> *Ibid.*

<sup>662</sup> *Essex Lunch Co. v. Boston Lunch Co.*, 229 Mass. 557.



the estate of the owner.<sup>663</sup> But this proceeds upon the theory that the statute creates a lien against the estate of the lessee and "cannot be construed to give at the same time under such circumstances, a lien against the estate in reversion."<sup>664</sup>

§ 82. **Measure of damages.**—The question in every case is, how far the building is damaged by the alterations; and the opinions of experts familiar with the market value of similar premises, and especially with the rental value of such property, are competent evidence. So also is evidence of the cost of restoring the building to its former condition.<sup>665</sup>

Where by an agreement subsequent to a lease, the lessor is allowed to make certain alterations in consideration of a reduction of the rent, such reduction covers all damages occasioned by the alterations; and the lessee cannot recover additional damages for the closing of a window in accordance with the plan of the alterations, or for consequent loss of ventilation, or light, there being no evidence that the lessor acted unreasonably or in bad faith.<sup>666</sup> And the lessor is not at fault for refusing to permit attempts to repair the injury which are not explained to him.<sup>667</sup>

Where a lessor is liable for alterations, the damages must be assessed in one sum, and a decree reducing the rent by a certain amount each year is improper.<sup>668</sup>

§ 83. **Abatement of rent.**—The customary provision is to the effect that "if the premises or any part thereof, during the term, shall be destroyed or damaged by fire or other unavoidable casualty so that the same shall thereby be rendered unfit for use and habitation, then the rent hereinbefore reserved, or a just and proportionate part thereof according to the nature and extent of the injuries sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said lessor, or these presents shall thereby be determined and ended at the election of the said lessor or his legal representatives."<sup>669</sup>

<sup>663</sup> *Francis v. Sayles*, 101 Mass. 435; *Conant v. Brackett*, 112 Mass. 18.

<sup>664</sup> *McCue v. Whitwell*, 156 Mass. 205, per Knowlton, J. See Pub. St., c. 191, § 36.

<sup>665</sup> *Re Jewell*, 19 N. B. R. 383 (N. Y.)

<sup>666</sup> *Arafe v. Howe*, 228 Mass. 47.

<sup>667</sup> *Ibid.*

<sup>668</sup> *Ibid.*

<sup>669</sup> *Rich v. Smith*, 121 Mass. 328.

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Another form of the covenant is as follows: "Provided, however, that in case the premises or any part thereof, shall during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then and in such case the rent hereinbefore reserved, or a just and proportional part thereof, according to the nature and extent of the injury sustained shall be suspended or abated until the premises shall have been put by the said lessor, or those having his estate in the premises, in proper condition for use and habitation; and provided, also, that in case the demised premises are so far injured by fire, or other unavoidable casualty as to become unfit for use and occupation, then the lessor may elect whether to rebuild or repair the same or to terminate this lease; and in case this lease is terminated, for this cause, or for breach of any of the agreements herein contained, between the days whereon the rent herein reserved becomes due, then the lessee agrees to pay proportionate rent for the period of his actual occupation."<sup>670</sup> The clause "and in case of such destruction or damage, or a like destruction or damage by any taking or appropriation by public authority for public uses, then the lessor, his heirs or assigns may terminate this lease," is often added.<sup>671</sup>

Where there is an agreement that if the damage by fire be less than half the value of the building and in that case the lessor shall restore the premises to their former condition, and the lessor fails to do so, the lessee is entitled to an abatement which shall include the cost of restoration;<sup>672</sup> but where the latter recoups his damages under an answer claiming recoupment in such an action, it is an election by the tenant to take damages in that action for the lessor's continuing breach of the covenant to restore the premises, and the tenant cannot claim a second abatement in an action for subsequent rent.<sup>673</sup>

So an express adjustment of damages from fire, as by an

<sup>670</sup> *Shawmut National Bank v. Boston*, 118 Mass. 125.

<sup>671</sup> *Hunnewell v. Bangs*, 161 Mass. 132; *Munigle v. Boston*, 3 Allen, 230. See also *infra*, §§ 138, 139 as to the meaning and effect of these clauses.

<sup>672</sup> *Vorenberg v. William Filene's Sons Co.*, 227 Mass. 575.

<sup>673</sup> *Vorenberg v. William Filene's Sons Co.*, 232 Mass. 153.

allowance on the price under an agreement to purchase, precludes any further abatement under the lease.<sup>674</sup>

There is sometimes a clause providing for the abatement of a just proportion of the rent in case of a taking of a part of the premises by eminent domain.<sup>675</sup>

§ 84. Construction and effect of covenant.—Abatement of rent may be pleaded in the answer to an action for rent;<sup>676</sup> and under such covenants as those given above, if the rent has been paid in advance, the lessee is entitled to recover back a proportionate part, on the happening of destruction or damage.<sup>677</sup> The abatement of “a just and proportionate part of the rent” is made with reference to the rental value of the whole property, though only a part of the property is destroyed;<sup>678</sup> but the covenant applies only to rent, and there is no abatement of the taxes assessed during the term, even though the lessor does not rebuild.<sup>679</sup>

The fact that the property is of value to the tenant only during certain seasons of the year, as in the case of a summer hotel, does not alter the rule that abatement is to be made according to the period of possession which has expired.<sup>680</sup>

“Unavoidable casualty” is limited to “damage or destruction arising from supervening and uncontrollable force or accident.”<sup>681</sup> . . . This phrase is in very common use in leases in this country, and has, as we suppose, a well settled and understood meaning. It does not signify a mere want of repair arising from lapse of time or improper use of the premises; nor from trespasses or nuisances occasioned by the acts of the tenant or of third persons. Neither does it include any injuries which may happen by reason of the common and ordinary use and occupation of the estate leased or of the adjoining premises. . . . By a strict definition as applied to the subject-matter it signifies events or accidents

<sup>674</sup> Cawley v. Jean, 218 Mass. 263, 271.

<sup>675</sup> Arafe v. Howe, 228 Mass. 47. Cf. *infra*, §§ 138–140.

<sup>676</sup> Vorenberg v. W. Filene's Sons Co., 227 Mass. 575.

<sup>677</sup> Rich v. Smith, 121 Mass. 328. Cp. *infra*, § 225.

<sup>678</sup> Cary v. Whiting, 118 Mass. 363. (Case of boarding house on mill property used by mill operatives.)

<sup>679</sup> Minot v. Joy, 118 Mass. 308; Wood v. Bogle, 115 Mass. 30.

<sup>680</sup> Ware v. Hobbs, 222 Mass. 327.

<sup>681</sup> Welles v. Castles, 3 Gray, 323.

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which human prudence, foresight and sagacity cannot prevent." <sup>682</sup>

Therefore, no abatement can be had, where the damage proceeds from the failure of the landlord to repair the adjoining tenements; <sup>683</sup> or from gradual wearing out of machinery, <sup>684</sup> or from an undermining of a partition wall by an adjoining owner who has notified the lessor of his intention to build, even though by custom the lessor is bound to support his wall. <sup>685</sup>

Where the lessee is entitled to an abatement of rent but nevertheless pays the whole rent, he cannot recover the excess from the lessor even though he paid under protest. <sup>686</sup> If the lease provides for an abatement of rent in case of unavoidable casualty, and also that in such case the lessor may terminate the lease, the lessor may exercise his privilege, even though the lessee does not claim any abatement of rent. <sup>687</sup>

§ 85. Abatement apart from agreement.—As we have seen, apart from express agreement the failure of the lessor to repair does not permit any abatement of the rent; <sup>688</sup> and so neither does the total destruction of the premises by fire. <sup>689</sup> If the agreement relates only to "destruction" and does not mention injury, a partial destruction by fire will not terminate the lease under a provision that "if the premises be destroyed by fire, the payment of rent and the relation of landlord and tenant shall cease at the election of either party." <sup>690</sup>

<sup>682</sup> Welles v. Castles, 3 Gray, 323, p. 325, per Bigelow, J.

Whether a heavy snowstorm would be, *quære*. See Leavitt v. Fletcher, 10 Allen, 119, 121.

<sup>683</sup> Welles v. Castles, 3 Gray, 323.

<sup>684</sup> Bigelow v. Collamore, 5 Cush. 226. In this case it was held that evidence of a deduction made by the lessor in case of a particular instalment of rent was not competent on the general question of abatement of rent.

<sup>685</sup> Kramer v. Cook, 7 Gray, 550.

<sup>686</sup> This follows the general rule that money voluntarily paid where there is no mistake of fact cannot be recovered back. Regan v. Baldwin, 126 Mass. 485.

<sup>687</sup> Hunnewell, v. Bangs, 161 Mass. 132.

<sup>688</sup> *Supra*, § 72. Kramer v. Cook, 7 Gray, 550; Ware v. Hobbs, 222 Mass. 327.

<sup>689</sup> Fowler v. Bott, 6 Mass. 63; Davis v. Alden, 2 Gray, 309; Rogers v. Snow, 118 Mass. 118, 124; Roberts v. Lynn Ice Co., 187 Mass. 402; Gaston v. Gordon, 208 Mass. 265, 269. *Cp.* as to duty of lessee to rebuild, Phillips v. Stevens, 16 Mass. 238.

<sup>690</sup> Wall v. Hinds, 4 Gray, 256.

§ 86. **Tenements in a building.**—Where a suite of rooms is let in such a way that the occupant acquires no interest in the land, and there is no stipulation as to rebuilding in case of destruction, the occupant's interest is terminated if the premises be destroyed,<sup>691</sup> and the fact that the rent was paid in advance is immaterial.<sup>692</sup>

§ 87. **Indemnity of rent.—Reletting.**—A common form of this covenant is that in case of a determination of the estate by reëntry for breach of condition, "the lessee shall indemnify the lessor, or his heirs or assigns, for all loss and damage which he or they may, during the residue of the term above specified, suffer by reason of such determination, whether through decreased rents of said premises or otherwise."<sup>693</sup>

Another form was as follows: "And the lessee covenants that in case of such termination . . . it will indemnify the lessor against all loss of rent and other payments which he may incur by reason of such termination during the residue of the time . . . specified for the duration of the said term; or at the election of the lessor the lessee will upon such termination pay to the lessor as damages such a sum as at the time of the termination represents the difference between the rental value of the premises for the remainder of the said term and the rent and other payments named therein."<sup>694</sup> Under this wording the question whether the lessor elects to claim indemnity or damages is a question of fact with the burden upon him;<sup>695</sup> and, where he, on the day of the termination of the lease, verbally leased a portion of the premises to the former lessee, it is also a question of fact whether by such letting he waived his right to damages.<sup>696</sup> Still another form is as follows: "and thereupon [upon reëntry] the lessor may, at his discretion, relet the premises at the risk of the lessees,

<sup>691</sup> *Stockwell v. Hunter*, 11 Met. 448; *Shawmut Bank v. Boston*, 118 Mass. 125. *Cp. Rogers v. Snow*, 118 Mass. 118, 124, and *Lodgings, supra*, § 4.

<sup>692</sup> Whether a proportionate part of the rent could be recovered back, *quære*. *Stockwell v. Hunter*, 11 Met. 448. *Cp. infra*, § 225.

<sup>693</sup> *Cf. Woodbury v. Sparrell Print*, 187 Mass. 426; *Weeks v. International Trust Co.*, 125 Fed. 370.

<sup>694</sup> *Gardner v. Parsons*, 224 Mass. 347. *Cf. Cotting v. Hooper*, *Lewis & Co., Inc.*, 220 Mass. 273.

<sup>695</sup> *Gardner v. Parsons*, 224 Mass. 347, 351.

<sup>696</sup> *Ibid.*; *Boyden v. Hill*, 198 Mass. 477, 485, 486.

who shall remain for the residue of the term credited with such amounts only as shall be by the lessor actually realized; and the lessor shall be allowed five per cent commission for collecting the same, and reasonable charges for repairs, etc.”<sup>697</sup>

Under this last form, it was held that a reëntry did not discharge one of the original lessees, although he was described as a “surety”; but that he remained liable on his covenants.<sup>698</sup> The provision that the lessee shall be credited only with the sums actually received for the use and occupation of other persons to whom the premises are relet by the lessor, is in accord with the legal rights of the parties.<sup>699</sup>

It is sufficient, to enable the lessor to recover on this covenant, that, after reëntry, he manages the property according to his best judgment for the benefit of the lessee as well as of himself;<sup>700</sup> but the burden is upon him to show not only that the premises were vacant, but that he used due diligence to relet.<sup>701</sup> He is not obliged to accept tenants whose financial responsibility is reasonably doubtful, even though they are satisfactory to the lessee;<sup>702</sup> nor is he obliged to alter the premises, or to lease for a longer term, in order to make a better lease.<sup>703</sup> If the wording of the covenant merely gives the lessor an option to relet, it seems that he must offer evidence of an election to relet in order to recover on the covenant.<sup>704</sup>

A claim for loss of rent under this covenant may be the subject of a bill in equity to reach property fraudulently conveyed.<sup>705</sup> In such a bill, an averment that the defendant owes the plaintiff for accrued instalments of rent and loss of rent according to an account annexed, when the account contains a charge of an item on the first day of each month “instalment of rent due under lease” is sufficient, though the date of ter-

<sup>697</sup> *Way v. Reed*, 6 Allen, 364.

<sup>698</sup> *Ibid.*

<sup>699</sup> *Deane v. Caldwell*, 127 Mass. 242, 248; *Inches v. Dickinson*, 2 Allen, 71; *Dwight v. Mudge*, 12 Gray, 23; *Re Orne*, 12 Fed. Rep. 779, 781.

<sup>700</sup> *Edmands v. Rust & Richardson Drug Co.*, 191 Mass. 123.

<sup>701</sup> *Woodbury v. Sparrell Print*, 198 Mass. 1.

<sup>702</sup> *Edmands v. Rust & Richardson Drug Co.*, 191 Mass. 123.

<sup>703</sup> *Woodbury v. Sparrell Print*, 198 Mass. 1.

<sup>704</sup> *Weeks v. International Trust Co.*, 125 Fed. Rep. 370 (C. C. A. First Circuit).

<sup>705</sup> *Woodbury v. Sparrell Print*, 187 Mass. 426. *Cp. G. L.*, c. 214, § 3, cl. 9.

mination of the lease is not named, if it is found that the rate of payment to be made was the same after the termination of the lease as it was under it, and the defendant knew the date.<sup>706</sup> But such a bill brought before the end of the lease and while the premises are unlet, is premature, as the amount of loss is not then ascertained.<sup>707</sup>

This covenant has no reference to rent accruing before entry, and the fact that the landlord lets and receives more rent for the whole period of the first lease than he would have received had there been no breach of condition does not relieve the original lessee from liability to pay such back rent.<sup>708</sup>

If the lessee continues to occupy with the assent of the lessor, after entry for breach of covenant, the lessor may elect whether to sue him for rent or upon his contract of indemnity.<sup>709</sup>

Where the lessee has made a voluntary assignment, and the lessor has terminated the lease and become a party to the assignment, the latter may proceed by a bill in equity against the lessee and the assignee to recover on the covenant of indemnity.<sup>710</sup>

As to the proof of the damages suffered by the lessor in bankruptcy, see *infra*, § 328.<sup>711</sup>

In the absence of this covenant, a reëntry absolutely terminates the tenancy and the lessor has no further claim against the lessee.<sup>712</sup>

Where an attorney without power of substitution employed another attorney, and the latter in consideration of the surrender of his lease by a general lessee verbally agreed to indemnify the lessee against the claims of sublessees under him, it was held that the agreement was without authority and could not be enforced.<sup>712a</sup> And, further, that the employment of

<sup>706</sup> Woodbury v. Sparrell Print, 187 Mass. 426.

<sup>707</sup> *Ibid.*

<sup>708</sup> Richardson v. Gordon, 188 Mass. 279.

<sup>709</sup> Edmands v. Rust & Richardson Drug Co., 191 Mass. 123. Query whether in such case it is material whether the declaration is for rent or for indemnity.

<sup>710</sup> Gardner v. Parsons, 224 Mass. 347.

<sup>711</sup> Also *Re Orne*, 12 Fed. Rep. 779, 781; *Abbott v. Stearns*, 139 Mass. 168, 171; *Re Lake*, 16 N. B. R. 497; s. c., 2 Lowell, 544.

<sup>712</sup> Sutton v. Goodman, 194 Mass. 389, 395.

<sup>712a</sup> Smith v. Abbott, 221 Mass. 326.



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the second attorney to collect rent or to eject the general lessee conferred no power to make such an agreement.<sup>712b</sup>

§ 88. **Renewal and extension.—Effect of covenant.**—It is quite common to insert in a lease a covenant on the part of the lessor to renew the lease at the end of the term for a further period if the lessee shall so desire, but this does not require a covenant of renewal in the second lease. "The word [renew] *ex vi termini* imports the giving a new lease like the old one with the same terms and stipulations, at the same rent and with all the essential covenants."<sup>713</sup> To this rule there is one exception equally well established with the rule itself. The renewal covenant is not to be inserted in the new lease; that agreement is satisfied and exhausted by a single renewal. An agreement to renew *toties quoties* will not be inferred in the absence of words clearly pointing to that intention."<sup>714</sup> The covenant runs with the land and purchasers from the lessor are charged with notice of the terms of the lease.<sup>715</sup> But where, before the end of the term, the lessor conveyed to a third person, and represented to him that the tenant had no written lease, when in fact he did have one for five years with a provision for renewal for five years more, which lease had never been recorded as required by statute, the purchaser was held not chargeable with actual notice of the lease and not bound to renew the same even in equity.<sup>716</sup>

In one case, the agreement was that occupation by the lessee, after the expiration of the lease, should, at the option of the lessor, constitute a renewal. On the last day of the term the lessee wrote to the lessor proposing to occupy for another month as tenant at will or at sufferance, and remained in possession, although he moved out before the expiration of the additional month. It was held that his conduct operated as a renewal of the lease.<sup>717</sup>

In general, the same covenants and provisions apply in

<sup>712b</sup> Smith v. Abbott, 221 Mass. 326.

<sup>713</sup> Lamson v. Coulson, 234 Mass. 288, 295. Cf. *supra*, § 55.

<sup>714</sup> Foster, J., in Cunningham v. Pattee, 99 Mass. 248.

*Aliter*, of a covenant to "renew and to continue to renew." Page v. Esty, 5 Me. 319.

<sup>715</sup> Cunningham v. Pattee, 99 Mass. 248; Gannett v. Albree, 103 Mass. 372.

<sup>716</sup> Toupin v. Peabody, 162 Mass. 473.

<sup>717</sup> Hildreth v. Adams, 229 Mass. 581.



an extension as in the original lease;<sup>718</sup> and this is especially true where the extension provides that all the terms of the original lease are to apply to the extended period.<sup>719</sup> If the extension is silent on this point, it seems that extrinsic evidence is admissible to show that, by a contemporaneous parol contract, certain terms and conditions of the original lease were not to apply to the extension.<sup>720</sup> But where the agreement of extension has been reduced to writing, it cannot be claimed that the parol negotiation suspended any condition of the original lease, so that it could not be included in the wording of the extension.<sup>721</sup>

The covenant to renew may be on a condition, to be fulfilled either before or during the second term. Thus, where a lease gave the tenant the privilege of holding for two additional years, "unless the society shall sell said store, in which case the privilege in addition shall be null and void," it was held that the privilege was to be void in case of a sale of the store by the society, either before the beginning or during the running of the term.<sup>722</sup> Where a covenant provided for renewal, "rent to be proportioned to the valuation of the premises at said time," but no valuation was provided for and no method indicated by which the valuation could be obtained, it was held that the covenant was too vague to be enforced in equity.<sup>723</sup> An express covenant against renewal may be inserted in the lease.<sup>724</sup>

The covenant to renew runs with the land.<sup>725</sup>

The fact that, after a lessor has given a sublease containing

<sup>718</sup> *Wood v. Edison, etc., Co.*, 184 Mass. 523 (covenant to pay taxes); *DeFriest v. Bradley*, 192 Mass. 346 (provision for termination by lessor); *Cunningham v. Pattee*, 99 Mass. 248.

<sup>719</sup> *DeFriest v. Bradley*, 192 Mass. 346.

<sup>720</sup> *Ibid* (lessor's right of cancellation).

<sup>721</sup> *Ibid*.

<sup>722</sup> *Knowles v. Hull*, 97 Mass. 206.

<sup>723</sup> *Pray v. Clark*, 113 Mass. 283.

<sup>724</sup> Where the lessor was to pay for buildings, etc., left by the lessees at the expiration of the term, "provided the premises shall not be relet to the lessees or their representatives," it was held that an occupation as tenants at will after the expiration of the lease was not such a "reletting as was contemplated," not being for a fixed and definite term. *Moseley v. Allen*, 138 Mass. 81. *Cp. Carpenter v. Pocasset Manuf. Co.*, 180 Mass. 130.

<sup>725</sup> See *supra*, § 55.

a covenant for rent his own term, he is renewing his own lease by his covenant.<sup>726</sup>

For breach of title to the excess of value the premises might expective profits of business.

§ 89. Form of extension of a lease, to be extended. We the undersigned mutually covenant and extended for the term thereof, subject to the terms and agreements therein contained, and seal this—day of—

The extension of a lease for the additional term of years, or by something in writing over and the payment of an extension, but not a new lease.

A clause giving a certain rent for a certain term, to the end of the first

<sup>726</sup> *Albani v. Evening*

<sup>727</sup> *Neal v. Jefferson,*

<sup>728</sup> In *Wall v. Hinds,* follows: (Provision for extension) "If, however, upon request in writing to the said lessor, he will continue to hold the premises at the rate of fifteen dollars per annum, the right so to hold the premises shall be deemed to be the lessors or their legal representatives."

<sup>729</sup> *Leavitt v. Maykel*

<sup>730</sup> *Ibid.* Cp. *infra,* § 90.

<sup>731</sup> *Kimball v. Cross,*

"The agreement itself requiring only the lap of time, and the defendant to become a tenant, the validity is the fact of extension."

tenant shall have the right to occupy for a further term after the death of the lessor does not create a present demise, in other words, is not a renewal of the term, especially where the lessor agrees to provide "by will or otherwise that this agreement shall be kept."<sup>732</sup> The question in each case is as to the intention of the parties.

§ 90. Election to renew.—The covenant frequently is not a strict covenant of renewal contemplating the making of a new lease, but a provision that the term shall be a longer one than the one originally agreed upon if the lessee so elect;<sup>733</sup> and, if the option to renew is exercised, there is a present demise to take effect at the expiration of the first term.<sup>734</sup>

The election to renew by the tenant need not be formally expressed to the lessor, but may be evidence by any actions tending to show a decision,<sup>735</sup> unless it be expressly provided for in the lease.<sup>736</sup> An express provision for notice could of

Cp. as to the difference between a lease and an agreement for a lease, *supra*, § 11.

In *Kramer v. Cook*, 7 Gray, 550, the language was as follows: "to hold for the term of three years from the date hereof, yielding and paying therefor the rent of seven hundred dollars a year; and at the election of said Cook for the further term of two years next after said term of three years, yielding and paying for said term of two years a rent of seven hundred and fifty dollars a year."

<sup>732</sup> *Weld v. Traip*, 14 Gray, 330; *Cummings v. Hackett*, 98 Mass. 51. Cp. *O'Brien v. Ball*, 119 Mass. 28; *Delano v. Montague*, 4 Cush. 42; *McGrath v. Boston*, 103 Mass. 369.

In *Weld v. Traip*, *supra*, Shaw, C. J., said, p. 333: "We are not . . . disposed to question the power of an owner in fee, who has the general *jus disponendi* to create a term for five or five hundred years, to commence *in futuro*, even after his own decease, so as in effect substantially to alienate the entire value of the estate, and thus when the descent should be cast, subject the estate to the incumbrance of the term. The first remark is, that as this would be of very rare occurrence . . . the intention should appear in plain and manifest terms."

<sup>733</sup> *Stone v. St. Louis Stamping Co.*, 155 Mass. 267; *Cary v. Whiting*, 118 Mass. 363.

<sup>734</sup> *DeFriest v. Bradley*, 192 Mass. 346; *Kimball v. Cross*, 136 Mass. 300; *Leominster Gaslight Co. v. Hillery*, 197 Mass. 267.

<sup>735</sup> *Kimball v. Cross*, 136 Mass. 300; *Kramer v. Cook*, 7 Gray, 550; *Stone v. St. Louis Stamping Co.*, 155 Mass. 267; *Albiani v. Evening Traveler Co.*, 220 Mass. 20, 26.

<sup>736</sup> *Stone v. St. Louis Stamping Co.*, 155 Mass. 267.

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course be waived by the lessor;<sup>737</sup> and, when the further term is to be held only at an increased rent, an acceptance of such rent by the lessor is a waiver of notice.<sup>738</sup>

Where a lease provided that the lessee should have the privilege of renewal at an increased rent, provided three months' notice were given, and the notice was given, but no new lease was made, and the lessee held over paying the increased rent, it was held, *semble*, that he was holding under the lease, but that if he had only a covenant it would be a good equitable defence to summary process.<sup>739</sup> So if, at the end of the first term, the tenant continues in possession of a building which he has erected, and he is not ready to move and pays rent subsequently, these facts are competent evidence of an election by the tenant to renew the lease.<sup>740</sup> It is competent for the tenant to rebut the presumption arising from his continuing in possession; as by showing that he did so as tenant at will, under an oral agreement made by the lessor before the execution of the lease. "Such evidence contradicts no term of the lease. It simply shows that the option secured to the tenant by the lease has not been exercised."<sup>741</sup>

*A fortiori*, where the lease provides that if no notice of termination is given at a certain time before the end of the term, the lease shall continue, no notice of election to continue is necessary.<sup>742</sup>

Where a lease contains an option of renewal to the lessee for a definite period, an agreement for an extension for a different period is no evidence that the option has not been exercised, as the length of time for the extension may be modified by agreement.<sup>743</sup>

§ 91. Specific performance.<sup>744</sup>—A breach of covenant during the term on the part of the lessee may disentitle him to

<sup>737</sup> Wood v. Edison, etc., Co., 184 Mass. 523, 527.

<sup>738</sup> Kramer v. Cook, 7 Gray, 550; Stone v. St. Louis Stamping Co., 155 Mass. 267.

<sup>739</sup> Ferguson v. Jackson, 180 Mass. 557.

<sup>740</sup> Kimball v. Cross, 136 Mass. 300. See also Atlantic Nat'l Bank v. Demmon, 139 Mass. 420; Hill v. Hayes, 199 Mass. 411.

<sup>741</sup> Atlantic Nat'l Bank v. Demmon, 139 Mass. 420. See also Bradford v. Patten, 108 Mass. 153, that such evidence is not conclusive.

<sup>742</sup> Dix v. Atkins, 130 Mass. 171. See Toupin v. Peabody, 162 Mass. 473. This provision is of course not strictly a covenant for a renewal.

<sup>743</sup> Wood v. Edison, etc., Co., 184 Mass. 523.

<sup>744</sup> See also *infra*, § 288, and Pray v. Clark, *supra*, § 88. Toupin v.

have specific performance of a covenant to renew;<sup>745</sup> and so will undue delay in enforcing the covenant, unless it appears the landlord has suffered no injury from the delay.<sup>746</sup>

Where a sublessee has a right of renewal he may enforce it against the owner after a surrender by the lessee.<sup>747</sup>

§ 91a. **Damages.**<sup>748</sup>—In determining in equity the value of a right of renewal, the testimony of the plaintiff may furnish some basis for determining the profits of his business, even though he kept no books of account.<sup>749</sup> But evidence as to the custom of keeping books by others in the same business, and as to accommodations in other parts of the building unlike those of the plaintiff, are properly excluded.<sup>750</sup>

Where the lessor dies before an agreement for a renewal of a lease has been carried into effect, the lessee may have a decree of specific performance against his personal representatives;<sup>751</sup> but it has been held that a covenant of renewal contained in a lease made by a trustee who has only a life estate, in an undivided share of the premises, cannot be specifically enforced against the remainder-man after the death of the life tenant.<sup>752</sup>

§ 91b. **Guaranty.**—As to whether a guaranty of rent runs during the renewal of a lease, see *supra*, § 64, and *infra*, § 237.

§ 92. **Sale of premises.**<sup>753</sup>—A provision is sometimes inserted giving the lessor the right to sell the property. Such a cove-

Peabody, 162 Mass. 473; *Albani v. Evening Traveller Co.*, 220 Mass. 20, 25; *Leominster Gas Light Co. v. Hillery*, 197 Mass. 267.

<sup>745</sup> *Gannett v. Albree*, 103 Mass. 372 (premises let for private dwelling used as a boarding house); *Squire v. Learned*, 196 Mass. 134.

<sup>746</sup> *Ryder v. Robinson*, 109 Mass. 67.

<sup>747</sup> *Albani v. Evening Traveller Co.*, 220 Mass. 20.

<sup>748</sup> *Cp.* also *supra*, § 88.

<sup>749</sup> *Albani v. Evening Traveller Co.*, 220 Mass. 20.

<sup>750</sup> *Ibid.*

<sup>751</sup> *Ibid.*

<sup>752</sup> *Bergengren v. Aldrich*, 139 Mass. 259. W. Allen, J., said on another point: "As regards the other two defendants, who appear to be bound by the covenant, the plea adopted by them also alleges that the demised premises are parcel of lands held in common by all the defendants, these defendants owning each an undivided third part. A lease of their interests would therefore be a lease of an undivided part of a separate parcel of land held in common. If there were no other reason, this would prevent a decree for specific performance by them to the extent of their interest.

<sup>753</sup> *Cp. infra*, § 150.

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nant, if made with the lessee and his assigns, runs with the land.<sup>754</sup>

It is valid for the lessor to reserve the right to sell, and to provide in the lease that any of the demised land sold during the term shall cease to be a part of the premises leased. Such a provision is not repugnant to the rule that a reservation is void which is repugnant to the words by which the estate is defined and limited, any more than a provision that the lessor may enter and terminate the lease.<sup>755</sup>

Where the lessee has the privilege of continuing for a further period after the expiration of his lease unless the lessor shall sell the premises, the privilege is void if the lessor sells, either during the original term or the additional term.<sup>756</sup> A clause giving the lessor the right to sell, by giving the lessee two months' notice and the privilege of purchasing at the price offered, is enabling and not restrictive, and the lessor may sell the premises subject to the lease without notice to the lessee.<sup>757</sup> A clause that "if the premises are for sale at any time, the lessee shall have the refusal of them," does not prevent the lessor from conveying them to a third person.<sup>758</sup>

§ 93. Sale to lessee.—The covenant may be to sell to the lessee. In such a case, it may either be an independent covenant or may end with the estate demised, and this is to be determined upon the meaning of the whole instrument.

In any case, an option to purchase is no part of the lessee's estate in the land. "It is a contract right and nothing more, although contained in the lease and although it is a contract

<sup>754</sup> *Hollywood v. First Parish in Brockton*, 192 Mass. 269.

<sup>755</sup> *Shaw v. Appleton*, 161 Mass. 313. See *Munigle v. Boston*, 3 Allen, 230, 232; *O'Connor v. Daily*, 109 Mass. 235; *Pyncheon v. Stearns*, 11 Met. 304.

<sup>756</sup> *Knowles v. Hull*, 97 Mass. 206.

<sup>757</sup> *Callaghan v. Hawkes*, 121 Mass. 298; *Levy v. Peabody*, 238 Mass. 167.

<sup>758</sup> *Fogg v. Price*, 145 Mass. 513. Holmes, J., said, p. 515: "This is simply an agreement to give the lessee the first chance to make a contract—an agreement to sell if the parties can agree, but not otherwise. It neither fixes the price nor provides any way in which it can be fixed. Suppose that the premises had been advertised for sale, and that the tenant had brought his bill at once, it is plain that the court could not have named any sum at which the lessor should be compelled to sell. Considered therefore in the light of a contract to sell, as it is treated by the bill, it does not satisfy the statute of frauds, and, apart from the statute, it is not such a contract as equity can specifically enforce."

right which passes to an assignee of the lease. It is not an extension or amplification of the lessee's estate."<sup>759</sup>

Thus, in one case, the lessors agreed to sell and convey within five years from the date of the lease "to the said lessee or his assigns upon his or their request, all their (the lessors') present rights, titles, interests and estates, and all the rights, titles, interests and estates they may have, or can, by all reasonable acts and efforts at law or in equity obtain or acquire at the date or time of the conveyance in and to all the aforesaid leased premises, with all the privileges and appurtenances thereto belonging." It was also provided that, if any part of the premises should be taken for public uses, the lessee should have the election to terminate the lease, or to restore the premises at an expense to the lessors not exceeding the damages awarded for the taking; that the lessors should not be liable for any loss of rent occasioned by such taking; that the damages awarded for such loss of rent should belong to the lessee; and that, if the lessee should terminate the lease "in the manner aforesaid or otherwise" the option to purchase should "also be terminated and ended." The court held from the provisions as to damages, from the fact that the right to purchase and the estate for years were both to commence on the same day, and that if the right to purchase were independent, the lessee might refuse to enter and yet have several years to acquire the property,—that the right to purchase would fall with the lease.<sup>760</sup>

Rights of purchase in the lessee are usually subject to be defeated by failure to observe other covenants to be performed by him, e. g., payment of rent, waste, etc.<sup>761</sup> Where a lessee who has an option to purchase, makes a tender which is refused, and then ceases to pay rent, claiming the rents and profits as his own, he must, on a bill for specific performance, pay interest on the purchase money from the time when he ceases to pay rent; he cannot claim the use both of the land and of the money.<sup>762</sup>

Under an agreement that the lessee may elect to purchase at any time before the expiration of the lease, for a certain

<sup>759</sup> *Cornell-Andrews, etc., Co. v. Boston & Providence R. R.*, 209 Mass. 298, 307, per Loring, J.

<sup>760</sup> *Ober v. Brooks*, 162 Mass. 102; *Cawley v. Jean*, 218 Mass. 263.

<sup>761</sup> *Sanders v. Bryer*, 152 Mass. 141.

<sup>762</sup> *Ibid.*

sum, and that in such event all moneys theretofore paid as rent shall be applied toward the purchase price, the lessee must, within a reasonable time after notice of election to purchase, tender the purchase price and demand a deed; and, if he does not do this, he remains liable for the rent.<sup>763</sup>

A lessee's option to purchase is a property right which his creditor may reach and apply by means of a creditor's bill.<sup>764</sup>

§ 94. **Sale of buildings, etc., at appraised value.**<sup>765</sup>—If the lessor agrees to purchase, at the end of the term, buildings erected by the lessee, the buildings to be appraised in a certain manner, the appraisal in such manner is not an absolutely necessary condition precedent to the obligation of the lessor to pay, but the lessee must do all in his power to obtain such appraisal, before bringing action;<sup>766</sup> and must use all reasonable efforts to consummate the purchase without unnecessary delay;<sup>767</sup> and if he fails to do this, he then holds without right, as if he had not elected to purchase.<sup>768</sup>

The language of this covenant in one case was as follows: "It is agreed by and between the parties, that at the expiration of this lease the buildings which have been heretofore erected by the lessee on the premises shall be appraised by three disinterested men, one to be chosen by the lessor, one by the lessee, and a third by said two appraisers thus chosen; and said P agrees to purchase said buildings of said H at the price so set by said appraisers."<sup>769</sup> Chapman, C. J., said of it: "This clause is to be construed with reference to its subject matter. By its terms, the appraisement was not to be made till the expiration of the lease. This would give no time for the removal of the buildings in case the appraisers should fail to agree; and by operation of law they would become the

<sup>763</sup> Hill v. Allen, 185 Mass. 25. Cf. Pomroy v. Gold, 2 Met. 500; Brown v. Davis, 138 Mass. 458.

<sup>764</sup> Eastern Bridge, etc., Co. v. Worcester Auditorium Co., 216 Mass. 426. Cp. G. L., c. 214, § 3, cl. 7.

<sup>765</sup> See also Improvements, *infra*, § 103, and Buildings as Fixtures, *infra*, § 217.

<sup>766</sup> Hood v. Hartshorn, 100 Mass. 117.

<sup>767</sup> Washburn v. White, 197 Mass. 540, 545.

<sup>768</sup> *Ibid.*, p. 549.

<sup>769</sup> Hood v. Hartshorn, 100 Mass. 117.

If the landlord is to pay for buildings "on the efflux of the term," he is not bound to pay when the lease has been determined before such efflux by forfeiture for non-payment of rent. Kutter v. Smith, 2 Wall. 491.



property of the lessor without any conveyance or transfer. It would be unreasonable to construe the agreement so as to render the obligation of the lessor to pay for them entirely dependent upon the making of an appraisement. The appraisement is to be regarded as a mere method of ascertaining the price to be paid for them, yet the stipulation concerning the appraisement is not void. It gives the lessor certain rights which are preliminary to the rights of the lessee to maintain an action for the price. It binds the lessee to do all that was reasonably in his power to procure the stipulated appraisement." Another form of the provision is: "Said lessors or their legal representatives may terminate this lease at the expiration of five years from said first day of October, by giving to the said lessee three months' notice in writing of their intention to do so, and taking at the appraisal of three judicious, disinterested men, one to be chosen by each of said parties, and the other by the two that may be so selected, all the furniture of the lessee belonging to the establishment, and tendering him payment therefor accordingly."<sup>770</sup> Where there is no provision in such a covenant that the award of a majority of the appraisers shall be valid, such an award is of no effect.<sup>771</sup>

A covenant of the lessor to pay the lessee, his heirs or assigns "a just and reasonable sum for such buildings and improvements as they, the said lessees, may have put thereon," includes those put on the property by a subtenant or an assignee.<sup>772</sup>

Where it was agreed that, if the lessor decided to remove certain buildings upon the leased premises, he might terminate the lease by paying the lessee a certain sum, it was held that this was a privilege of the lessor, and not a covenant for the payment of liquidated damages; and that the remedy of the lessee was by an action for an eviction and not for the sum named.<sup>773</sup>

§ 95. Arbitration.—A provision that any matters in dispute between the lessor and the lessee shall be submitted to arbitration, does not prevent the lessor from suing without any offer of arbitration on the lessee's covenant to pay rent.<sup>774</sup>

<sup>770</sup> Wall v. Hinds, 4 Gray, 256.

<sup>771</sup> Washburn v. White, 197 Mass. 540.

<sup>772</sup> Hollywood v. First Parish in Brockton, 192 Mass. 269.

<sup>773</sup> Harrison v. Jordan, 194 Mass. 496.

<sup>774</sup> Rowe v. Williams, 97 Mass. 163. *Cp. supra*, § 94, and *infra*, §§ 103, 217.

§ 96 TENANCY FOR YEARS UNDER A WRITTEN LEASE

One form of the covenant is as follows: "If at any time during the continuance of this lease, any dispute should arise between the lessor and the lessee, their respective executors, administrators or assigns, the question in dispute shall be submitted to arbitrators, one to be appointed by each of the persons in interest and the third to be selected by the two thus appointed: their award shall be final."<sup>776</sup>

Where there was an agreement that, after a lease had run for a certain time, certain arbitrators should determine the future rent and indorse their award on the lease, it was held not to be sufficient that they made an award on a separate paper and annexed an entirely different paper to the lease.<sup>778</sup> At the present time, such a mistake could probably be corrected in equity.

Any award which does not cover all the matters submitted to arbitration is invalid.<sup>777</sup> Whether in the absence of this covenant there can be an oral reference to arbitration, query.<sup>778</sup>

§ 96. Board, Furnishing of.—A lease, otherwise valid, is not affected in its validity by a provision that the lessor shall serve a private table for the benefit of the lessee.<sup>779</sup>

The fact that the lessee furnished board to the lessor and his family, under an agreement that he should be paid for so doing, is no defence to a demand for rent payable in advance, especially where the amount due for board does not equal the rent.<sup>780</sup>

§ 96a. Buildings, Erection of.—If an agreement collateral to an undertaking by the lessee to erect a certain building upon the premises, and the parties differ as to the character of the building required, and the court refuses to decree specific performance, the fact that the lessee's contention was correct does not excuse him from liability for damages for failure to erect any building at all.<sup>781</sup> In such a contract, the expressions "in a manner satisfactory to" the lessor, and "in a manner to the reasonable satisfaction of the" lessor both mean that the

<sup>776</sup> *Rowe v. Williams*, 97 Mass. 163.

<sup>778</sup> *Montague v. Smith*, 13 Mass. 396.

<sup>777</sup> *Kabatchnick v. Hoffman*, 226 Mass. 221.

<sup>778</sup> *Ibid.*

<sup>779</sup> *Porter v. Merrill*, 124 Mass. 534. *Cp.* as to Lodgings, *supra*, § 4.

<sup>780</sup> *Morrill v. De la Granja*, 99 Mass. 383.

<sup>781</sup> *Wentworth v. Manhattan Market Co.*, 218 Mass. 91. *Cf. s. c.*, 216 Mass. 374.

work is to be done in such a way as should reasonably satisfy the lessor.<sup>782</sup>

Where a lessee is to occupy a building to be erected by him, at a certain rent from the date of occupation to the termination of the lease, and he fails to erect the building, the lessor is entitled to recover as damages not the cost of such a building, but the present worth of it subject to the lease.<sup>783</sup> And on that issue, unaccepted bids are not admissible to show the cost of such a building.<sup>784</sup>

And the lessor is likewise entitled to recover the increased rent stipulated to be paid for the occupation of the building from the date of the rescript of the court, with six per cent interest on any monthly instalments unpaid.<sup>785</sup>

§ 96b. **Business competing.**—Where a lessor agrees that, during the term of the lease, he will not lease certain premises for a business competing with that of the lessee, he may be restrained in equity from so doing.<sup>786</sup>

§ 97. **Compensation of lessee for termination of lease.**—A provision is sometimes inserted giving the lessor the right to terminate the lease by giving notice. Where it was provided that, if the lease was terminated during the first three years of the tenancy, the lessee should be compensated for the loss he might “by such abridgment sustain in consequence of expenditures incurred by the lessee in fitting up the premises, and expenditures incurred in removing,” it was held that “fitting up the premises” included both the fitting up the building and premises to his uses, and also the fitting of his furniture to the building.<sup>787</sup> In such a case, the measure of damages “is the loss [the lessee] has sustained by reason of having incurred expenditures, the full benefit of which he has lost by the abridgment of his lease,” and not the entire cost of fitting up.

§ 97a. **Conveyance.**—An agreement to convey forthwith a certain right of way from the premises leased to a certain street, calls for a conveyance free from incumbrances.<sup>788</sup>

<sup>782</sup> *Wentworth v. Manhattan Market Co.*, 218 Mass. 91.

<sup>783</sup> *Ibid.*

<sup>784</sup> *Ibid.*

<sup>785</sup> *Ibid.*

<sup>786</sup> *Strates v. Keniry*, 231 Mass. 426.

<sup>787</sup> *Pratt v. Paine*, 119 Mass. 439.

<sup>788</sup> *Wentworth v. Manhattan Market Co.*, 216 Mass. 374.

§ 98. Crops, Carry produce is not broken see's creditors and a covenant by the lessor the hay or other for produced thereon during wrongfully attached include in his damages forming his covenant lessor upon it.<sup>700</sup>

§ 98a. Deposit by sum of money with of the terms of the that the deposit shall lease if no default shall have been made, then will properly compel upon the expiration termination by eviction of the lease with such a case, the lessor time of the eviction lease, as it was due to of indemnity of rent.

§ 98b. Elevator, Undertakers, especially freightors may covenant "to use only and will allow no covenant may be with conduct."<sup>704</sup>

<sup>700</sup> Smith v. Putnam, 3

"The general principle not to assign, transfer, the lessee; that sales or no breach; though if such covenants they shall be 221, per Parker, C. J.

<sup>700</sup> Clapp v. Thomas, covenants, *supra*, § 40.

<sup>701</sup> Sutton v. Goodman

<sup>702</sup> *Ibid.* Cp. Edmand

<sup>703</sup> Follins v. Dill, 229

<sup>704</sup> *Ibid.*

**§ 99. Fuel, Use of.**—There may be a clause regulating what fuel shall be used by the lessee upon the premises, as “that no fuel but anthracite coal shall be used in said stoves.”<sup>795</sup> Such clauses may be important in view of city ordinances as to smoke nuisances and smoke-consuming appliances.

**§ 100. Heating.**—“To deliver possession of the same to the lessee upon completion of said building and thereafter, during the term of this lease, reasonably to heat and light the demised premises.” Such a covenant is valid and will be specifically enforced in equity. The covenant requires the apparatus to be ready for use at the time of delivery.<sup>796</sup> But it does not require the apparatus to be physically upon the demised premises; the covenant is satisfied if the lessor furnishes sufficient heat by pipes from an adjoining building.<sup>797</sup>

Where a lease provided “that the demised premises shall be heated by the lessors to a proper warmth for office purposes” it was held that this provision related to the degree of heat only, and not to the hours of heating. As the lease was ambiguous as to the hours of heating, extrinsic evidence of the custom in other similar buildings for similar purposes, was admissible to show the intention of the parties to the lease.<sup>798</sup> In an action by a lessee against a lessor for failure to heat properly certain rooms, the measure of damages is the difference in the value of the premises heated according to agreement, and their value heated as they were in fact heated, and this difference cannot exceed the reasonable cost of supplying the heat which the lessor agreed to furnish.<sup>799</sup> Evidence may therefore be introduced as to the value of the premises as they were in fact heated, and the way in which persons occupying the premises were affected by the temperature.<sup>800</sup>

<sup>795</sup> *Lowell Meeting-House v. Hilton*, 11 Gray, 407.

<sup>796</sup> *Jones v. Parker*, 163 Mass. 564.

<sup>797</sup> *Lumiansky v. Tessier*, 213 Mass. 182.

<sup>798</sup> *New York Central Railroad v. Stoneman*, 233 Mass. 258; s. c., 236 Mass. 81; *Reynolds v. Boston Rubber Co.*, 160 Mass. 240, 245; *Strong v. Carver Cotton Gin Co.*, 197 Mass. 53; *W. T. Tilden Co. v. Densten Hair Co.*, 216 Mass. 323.

<sup>799</sup> *McCormick v. Stowell*, 138 Mass. 431.

<sup>800</sup> *Stanwood v. Comer*, 118 Mass. 54.

“The lessor fits up the building with such fixtures and conveniences as he thinks proper, and lets it in that condition to the various tenants. The interest on the money invested, and the damage expected to be done to the building or any of its parts by use and general wear and decay,

## § 101 TENANCY FOR YEARS UNDER A WRITTEN LEASE

If the lessee of part of a building covenant to pay his proportionate part of the cost of heating the building by steam, the interest on the cost of the plant, repairs and depreciation are not to be included in the "cost of heating."<sup>801</sup> In an action by the lessor to recover the above-mentioned proportionate part, where the lessee attempts to show that his premises were not properly heated, he cannot show for the purpose of proving his damages, his average daily expenses.<sup>802</sup>

Where a lessee agrees to pay extra for steam heat at a certain rate per foot of radiating surface yearly, he is liable to pay for the number of feet of radiating surface on the premises when the lease was made, and cannot claim to pay only for what he chose to use or for what was reasonably necessary.<sup>803</sup>

§ 101. Ice and snow.—A frequent covenant is that the lessee shall save the lessor harmless "from any claim or damage arising from neglect in not removing snow and ice from the roof of the building or from the sidewalks bordering from the premises so leased."<sup>804</sup> Such a covenant does not operate to give the lessee the sole occupancy of the sidewalk in front of a part of the premises occupied by the lessor or bind him to keep the same in general repair;<sup>805</sup> but does make him liable to third persons who are injured on the sidewalk;<sup>806</sup> even though the may be tenant only of the ground floor and basement, and there is another tenant on the top floor under a similar covenant, and the accident is caused by water from the roof.<sup>807</sup>

§ 102. Improvement of land.—A provision that the lessee shall "have the improvement of all the homestead land" entitles him to use it "only for the purpose for which, in con-

are matters for him to consider in determining upon the rent which he shall require of his tenants. . . . The obvious interpretation of [the lessee's] covenant upon that subject is that he will contribute his proportion of the actual outlay or expenditure incurred in the current, ordinary and regular supply and management of that apparatus for the general benefit of the tenants." Per Ames, J.

<sup>801</sup> *Stanwood v. Comer*, 118 Mass. 54.

<sup>802</sup> *Ibid.*

<sup>803</sup> *Library Bureau v. Lothrop Pub. Co.*, 180 Mass. 372.

<sup>804</sup> *Leydecker v. Brintnall*, 158 Mass. 292; *Wixon v. Bruce*, 187 Mass. 232. See also *Cerchione v. Hunnewell*, 215 Mass. 588.

<sup>805</sup> *Leydecker v. Brintnall*, 158 Mass. 292. See *infra*, § 342.

<sup>806</sup> *Wixon v. Bruce*, 187 Mass. 232.

<sup>807</sup> *Ibid.* Cf. *supra*, § 73.

nection with the occupation of the whole estate, it was prepared, set apart and exclusively appropriated," and he cannot therefore grant a license to a stranger to pass over the land for the latter's own purposes, against the will of the lessor.<sup>808</sup>

§ 103. Improvements.—"The word 'improvements' is of broad signification, covering not only repairs and additions to buildings in existence at the time of the demise, but also new buildings subsequently erected."<sup>809</sup>

Where lessees had a right of renewal on a rental to be agreed upon, "or in case of failure so to agree, the said lessor shall purchase the improvements upon said land at a valuation to be agreed upon by the parties, or if they cannot so agree, at a valuation to be ascertained by three disinterested referees; or if the lessor shall prefer not to purchase said improvements the lessees shall purchase said land," it was held that the covenant to purchase improvements was not conditional on the tenants' renewing the lease, but included the case of failure to agree because the tenants were unwilling to pay any rent at all.<sup>810</sup>

The covenant may be that the lessees "agree to make improvements on said premises to the value of at least — dollars during said term and to leave the same therein at the end of said term if they do not purchase the premises." Such a covenant amounts to a promise to increase the value of the property to the amount named, and is to be taken as part of the consideration for the lease.<sup>811</sup>

§ 103a. Liability for injuries.<sup>812</sup>—A covenant is sometimes inserted that "in no case whatsoever shall the lessor be liable to the lessee, or to any other person for any injury, loss or damage to any person or property on the premises."<sup>813</sup>

<sup>808</sup> *Richardson v. Richardson*, 9 Gray, 213. See also *Use of Premises*, *infra*, § 108.

<sup>809</sup> *Peters v. Stone*, 193 Mass. 179, 185, per Braley, J. See *Lowell Meeting-House v. Hilton*, 11 Gray, 407; *Haven v. Adams*, 8 Allen, 363; *Daggett v. Tracy*, 128 Mass. 167.

<sup>810</sup> *Carpenter v. Pocasset Mfg. Co.*, 180 Mass. 130. *Cp. Mosely v. Allen*, 138 Mass. 81.

<sup>811</sup> *Peters v. Stone*, 193 Mass. 179, 185. *Cp. Haven v. Adams*, 8 Allen, 363; *Daggett v. Tracy*, 128 Mass. 167.

<sup>812</sup> See *supra*, §§ 71-74, and *infra*, §§ 187-201, 334-345.

<sup>813</sup> *Maran v. Peabody*, 228 Mass. 432.

## § 104 TENANCY FOR YEARS UNDER A WRITTEN LEASE

Such a covenant does not prevent the injured person from bringing action against the lessor if his negligence caused the injury.<sup>814</sup>

§ 104. **Lighting.**—As to this covenant, see Heating, *supra*, § 100.<sup>815</sup>

§ 105. **Nuisance, Against creating.**—As to this covenant, see Use of Premises, *infra*, § 108.

§ 106. **Signs.**—A provision “that the lessee may have the right to place signs upon the outer wall of said rooms” is not an exclusive right.<sup>816</sup> Such a right is *prima facie* to be exercised in reference to the condition of the premises at the time the lease was given; and, if another person has been occupying part of the outer walls with a sign, he may justify such occupation by a mere license from the owner. So, if one has a sign upon a certain part of a building, and subsequently leases another part of the building, but leaves the sign as before, a license to so maintain it will be implied.<sup>817</sup>

§ 107. **Steam power.**<sup>818</sup>—If the lessor covenants to furnish steam power to the lessee, and it is provided that, if at any time power should not be furnished, the rent should cease during that period, such provision cannot be construed to make cessation of rent a full recompense for the damages caused by a failure to furnish steam power as agreed.<sup>819</sup> If the power is to be furnished “as long as the lessor sees fit to let the lessee have it,” the lessee is not entitled to any notice of intention to shut off the power, and the principle of notice in case of tenancies at will of real estate has no application.<sup>820</sup>

Where the lessee is to have the “privilege to connect a pipe to the steam supply pipe to draw steam for use in the confectionery or in his business, when steam is in the supply pipe, provided same can be done without extra expense to the lessor, or those representing him, either for making changes

<sup>814</sup> *Maran v. Peabody*, 228 Mass. 432; *Follins v. Dill*, 221 Mass. 93, 98.

<sup>815</sup> As to the liability of a lessor, where a lessee has been obliged to pay damages to an employee injured by defective lighting apparatus, see *Consolidated Machine Co. v. Bradley*, 171 Mass. 127.

<sup>816</sup> *Pevey v. Skinner*, 116 Mass. 129.

<sup>817</sup> *Ibid.* *Cp. supra*, § 37.

<sup>818</sup> As to the liability of a landlord for the proper use of power leased, see *infra*, § 189; as to steam pipes, see *infra*, § 110.

<sup>819</sup> *Fisher v. Barrett*, 4 Cush. 381.

<sup>820</sup> *Shorey v. Farrell*, 114 Mass. 441.



or for supplying steam," he is entitled to have such an amount of steam for cooking purposes, as is not of considerable cost to the lessor; and the latter being in a better position to know the cost than the lessee, cannot charge for steam without notice to the lessee of his intention so to do.<sup>821</sup>

In a provision for an increased rent, in case the income for power let, other than that used or let by the lessees in the premises leased by them, amounts to a certain sum, the word "income" means gross receipts.<sup>822</sup>

§ 108. Use of premises.<sup>823</sup>—A covenant is now quite usual providing that the lessee shall not "make or suffer any unlawful, improper or offensive use of the premises."<sup>824</sup> Under such a covenant, a lessee is liable for the unlawful use of the premises by a subtenant, whether he knows it or not.<sup>825</sup> Under a covenant not to "make or suffer any unlawful, improper, noisy or otherwise offensive use" of the premises, it is a breach of such covenant to persistently use, in the daytime, the front outside balcony for the drying of clothes thereon, in full view of the passers-by, against the lessors' desire and protest.<sup>826</sup>

And the fact that the use of the premises becomes unlawful by reason of a change in the law near the end of the term requiring alterations in the construction of a building does not excuse the lessee from his covenant;<sup>827</sup> but he must make the required alterations, and if he does not and the lessor is obliged to make them, the latter may recover the cost.<sup>828</sup> Another covenant often inserted is that the lessee "will be responsible and will pay all damages and charges to the city government or others for any nuisance made or suffered on the premises during the term."<sup>829</sup>

When a building is leased for a certain business, the fact that it necessarily entails a nuisance gives no right to the

<sup>821</sup> *Smith v. Wenz*, 185 Mass. 229.

<sup>822</sup> *Hardy v. Briggs*, 14 Allen, 473.

<sup>823</sup> *Cp.* Forfeiture for Illegal Use, *infra*, §§ 128-132; also Improvement of Land, *supra*, § 102, and Competing Business, *supra*, § 96b.

<sup>824</sup> *Miller v. Prescott*, 163 Mass. 12.

<sup>825</sup> *Ibid.*; *Browne v. Niles*, 165 Mass. 276. *Cp.* Tremont Theatre Amusement Co. *v.* Bruno, 225 Mass. 461.

<sup>826</sup> *Finkovitch v. Cline*, 236 Mass. 196.

<sup>827</sup> *Baker v. Horan*, 227 Mass. 415.

<sup>828</sup> *Ibid.*

<sup>829</sup> *Browne v. Niles*, 165 Mass. 276.

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lessor to have the business stopped by an injunction in equity; his only remedy is to terminate the estate or to sue upon the covenants of the lease.<sup>830</sup>

On the other hand, where premises are leased for a particular purpose, such as selling liquor, there is no implied condition that the lessee shall be able to get a license; and he is liable for rent whether he is able to do business or not.<sup>831</sup> And the same is true of premises used for a garage, when the law was changed so that the lessee was deprived of such use unless extensive alterations were made.<sup>832</sup>

The facts that premises are described as "a garage," that the lessee agrees to pay certain expenses of "conducting said garage," and agrees not to sublet for garage purposes to a certain corporation, do not restrict his right to use the premises for any lawful purpose.<sup>833</sup>

Where premises are let to be used for a banking business, a permission given by the lessee to the adjoining owner to use the party wall above the roof of the bank for opening windows for the adjoining building, is not a violation of the terms of the lease.<sup>834</sup>

The covenant may be not merely that the premises shall be used for a certain purpose, but that they shall not be used for certain kinds of occupation. Such a provision is not void as being in restraint of trade, and will be upheld and enforced in equity by injunction.<sup>835</sup> Thus a lease providing that the premises shall be used "strictly as a private dwelling, and not for any public or objectionable purpose" is not complied with by using the premises as a boarding house, although the lessor has consented to their use for sleeping rooms in connection with a school.<sup>836</sup> On the other hand, where it was pro-

<sup>830</sup> *Browne v. Niles*, 165 Mass. 276 (where a pork business caused mud and dampness in a cellar).

<sup>831</sup> *Gaston v. Gordon*, 208 Mass. 265. *Cf.* *Boston & Worcester R. R. Co. v. Ripley*, 13 Allen, 421.

<sup>832</sup> *Barnett v. Clark*, 225 Mass. 185.

<sup>833</sup> *Ibid.*

<sup>834</sup> *Torrey v. Parker*, 220 Mass. 520. *Cf.* *Mount Hermon Boys' School v. Gill*, 145 Mass. 139; *Emerson v. Milton Academy*, 185 Mass. 414; *Albani v. Evening Traveller Co.*, 220 Mass. 20.

<sup>835</sup> *Pierce v. Fuller*, 8 Mass. 223; *Dorr v. Hanrahan*, 101 Mass. 531.

<sup>836</sup> *Gannett v. Albree*, 103 Mass. 372; *Dorr v. Hanrahan*, 101 Mass. 531 (deed with restriction against other buildings than dwelling houses, and

vided that the premises were "to be occupied for the same purposes as they now are," it was held that a change of use from manufacturing carpet bags to manufacturing caps would not avoid the lease.<sup>837</sup>

§ 109. Waste.—The usual form of covenant is not to "make or suffer any strip or waste" of the demised premises.<sup>838</sup>

Waste consists in the "spoil or destruction, done or permitted, to lands, houses, or other corporeal hereditaments, by the tenant thereof, to the prejudice of the heir or of him in remainder or reversion."<sup>839</sup> A removal of fixtures, which the tenant has a right to remove, is therefore not obnoxious to this covenant;<sup>840</sup> and the covenant does not cover any damages to the premises caused by such lawful removal.<sup>841</sup>

For the violation of an express covenant against waste the tenant is liable either in tort in the nature of an action of waste,<sup>842</sup> or in contract for breach of covenant.<sup>843</sup>

§ 110. Water, water pipes, and steam pipes.—If it be provided that the lessor shall not be liable for any damage to the lessee's goods caused by the bursting of water pipes, this provision covers pipes both within and without the premises leased.<sup>844</sup> One form of this covenant is as follows: "All merchandise, furniture and property of any kind which may be on the premises during the continuance of this lease is to be at the sole risk and hazard of the lessee, and that if the whole or any part thereof shall be destroyed or damaged by fire, water or otherwise, or by the use or abuse of the [city] water, or by the leakage or bursting of water pipes, or in any other way or manner, no part of said loss or damage is to be charged to, or be borne by the lessors, in any case whatever."<sup>845</sup>

no offensive trade or calling; held equity would restrain a use for a grocery store).

<sup>837</sup> *Shumway v. Collins*, 6 Gray, 227. See *Wheeler v. Earle*, 5 Cush. 31.

<sup>838</sup> *Wall v. Hinds*, 4 Gray, 256, 258, 270. See also Waste, *infra*, §§ 178, 202-204, and Action for Waste, *infra*, §§ 274-276.

<sup>839</sup> Bouvier Law Dict.

<sup>840</sup> *Wall v. Hinds*, 4 Gray, 256, 270.

<sup>841</sup> *Wall v. Hinds*, 4 Gray, 256, 271.

<sup>842</sup> See *infra*, § 276.

<sup>843</sup> *Brown v. Magorty*, 156 Mass. 209; *Wall v. Hinds*, 4 Gray, 256, 270.

<sup>844</sup> *Fera v. Child*, 115 Mass. 32; *Henry H. Tuttle Co. v. Phipps*, 219 Mass. 474.

<sup>845</sup> *Fera v. Child*, 115 Mass. 32.

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Where the covenant covers damages from water and steam pipes and from the use or abuse of water and steam, the lessor is not liable where his engineer allowed water to escape from the boiler of an engine running the elevator into pipes connected with the radiators and thence through open valves into the lessee's premises.<sup>846</sup>

A clause exempting the lessor from liability for loss or damage by fire, "water or otherwise," will not prevent a suit against the lessor as owner of an adjoining tract of land for discharging water therefrom on to the premises.<sup>847</sup>

§ 111. **Water power.**—In a lease of land and water power, a provision that the lessees "are not to make any waste of the water or suffer any to be made through their carelessness or negligence" is a covenant and not a condition.<sup>848</sup>

## SECTION IV

### TERMINATION OF TENANCY

§ 112. **Forfeiture and reentry in general.**—An estate for years may be granted to last "while" or "as long as" the lessee shall do a certain thing, or "until" a certain event shall happen. These words create a *conditional limitation*, that is to say, upon the happening of the event the estate is absolutely determined, and no entry or act is necessary to vest the estate in the person who is thereupon entitled to it.<sup>849</sup> But the usual lease carries a term for years absolutely,

<sup>846</sup> Henry H. Tuttle Co. v. Phipps, 219 Mass. 474.

<sup>847</sup> Smith v. Faxon, 156 Mass. 589.

<sup>848</sup> Gould v. Bugbee, 6 Gray, 371.

As to grants and reservations of water power, see Sibley v. Hoar, 4 Gray, 222; Dexter v. Manley, 4 Cush. 14; Kent v. Todd, 144 Mass. 478, and *supra*, § 39.

<sup>849</sup> 2 Bl. Com. 155; 1 Taylor, Landl. & Ten., 9th ed., § 273; 1 Wood, Landl. & Ten., 2d ed., 582; Woodfall, Landl. & Ten., 16th ed., 313; Cook v. Bisbee, 18 Pick. 527; Lockwood v. Clarke, 8 East, 185.

Where an estate was demised for so long as the tenant should keep a furnace and buildings upon the estate, it was held that when the furnace had fallen into decay the tenant's estate should not terminate until he had had a reasonable time to rebuild it. Cook v. Bisbee, 18 Pick. 527.

A verbal agreement to pay rent in advance is not a conditional limitation. Elliott v. Stone, 12 Cush. 174; Sprague v. Quinn, 108 Mass. 554; but such payment may be made a condition precedent to the vesting of an estate for the next rental period. Elliott v. Stone, 1 Gray, 571.

during which the covenants are binding upon the parties, with a *condition* that if the lessee does or fails to do certain acts the lessor shall have the right to enter and terminate the estate.

“Whether the particular form of words made use of amounts to a condition, a limitation, or a covenant merely, is matter of construction, depending upon the intent and meaning of the contract.”<sup>850</sup> “A proviso or condition differs from a covenant in this, that the former is in the words of and binding upon both parties, whereas the latter is in the words of the covenantor only. It is a rule in reference to provisos, that where a proviso is, that the lessee shall perform or not perform a thing, and no penalty is annexed to it, that it is a condition, otherwise it would be void; but if a penalty is annexed, it is a covenant.”<sup>851</sup>

The clause as to forfeiture and right of entry commonly called the “condition” is usually as follows:

“PROVIDED ALWAYS, and these presents are upon this CONDITION, that in case of a breach of any of the covenants to be observed on the part of the lessee or of those claiming under him, or in case the estate hereby created shall be taken from him or them by process of law, by proceedings in bankruptcy<sup>852</sup> or otherwise, the lessor or his heirs or assigns may, while the default or neglect continues, or at any time after such taking by process of law, and notwithstanding any license or waiver of any prior breach of condition, without any notice or demand enter upon the premises, and thereby determine the estate hereby created; and may thereupon expel and remove, forcibly if necessary, the lessee and those claiming under him and their effects.”

The phrase sometimes added at the end of the above “without being taken or deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant”

<sup>850</sup> 1 Taylor, Landl. & Ten., 9th ed., § 273.

<sup>851</sup> 1 Wood, Landl. & Ten., 2d ed., 581. See *Gray v. Blanchard*, 8 Pick. 284 (case of deed). In this case Parker, C. J., said, p. 288: “The word ‘provided’ alone may constitute a condition, but here the very term is used which is often implied from the use of other terms. ‘This conveyance is upon the condition’ can mean nothing more or less than their natural import.”

<sup>852</sup> As to the effect of this clause, see *infra*, § 322.

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seems to be unnecessary, in view of the decisions and the other language used above.<sup>853</sup>

Indeed, it has been expressly held that the lessor may at the same time enter and bring an action for rent in which he attaches personal property of the lessee on the premises, and may prevent the lessee from thereafter going upon the premises except to remove property exempt from attachment.<sup>854</sup>

Under this clause, as has been said above, a mere breach of condition occasioned by a breach of covenant does not determine the lease without actual entry. In other words, it is a *condition* and not a *conditional limitation*.<sup>855</sup> This was expressed by Dewey, J.,<sup>856</sup> as follows: "An estate upon condition is not defeated as a matter of course upon breach of the condition. It is wholly at the election of the party to whom the estate reverts, whether he will avail himself of the breach as a cause of forfeiture. He may decline taking advantage of it; and if so the estate is not defeated. Now if he may wholly waive the right to forfeiture by declining to enter for a breach, it would seem to follow, that if there are two or more causes of forfeiture, an entry particularly limited to one cause would

<sup>853</sup> As to these forms, see *Woodbury v. Sparrell Print*, 187 Mass. 426; *Cotting v. Hooper, Lewis & Co., Inc.*, 220 Mass. 273; *L. K. Liggett Co. v. Wilson*, 224 Mass. 456, 458.

As to the need of this clause see remarks of Loring, J., in *L. K. Liggett Co. v. Wilson*, 224 Mass. 456, 460.

<sup>854</sup> *Chetteville v. Grant*, 212 Mass. 17.

<sup>855</sup> *Rogers v. Snow*, 118 Mass. 118; *Chapman v. Harney*, 100 Mass. 353; *Shattuck v. Lovejoy*, 8 Gray, 204; *Fifty Associates v. Howland*, 11 Met. 99; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80; *Atkins v. Chilson*, 9 Met. 52, 62; *Wildman v. Taylor*, 4 Ben. 42. *Cp.* (cases of deeds) *Guild v. Richards*, 16 Gray, 309; *Hubbard v. Hubbard*, 97 Mass. 188; *Stone v. Ellis*, 9 Cush. 95; *Hall v. Middleby*, 197 Mass. 485, 489.

*Historical.* "After the action of *ejectione firmæ* was superseded by the action of ejectment in England, an actual entry for forfeiture was treated as a mere matter of form, and became unnecessary. In order to be admitted to defend, the tenant was obliged to confess it in his pleadings by admitting the fictitious statement contained in the declaration. But in this Commonwealth some act is held to be necessary. There must be an entry or possession with intent to hold the property for forfeiture; and there must be some manifestation of this intent," per Chapman, C. J., in *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80.

<sup>856</sup> *Atkins v. Chilson*, 9 Met. 52, 62.

be equivalent to declining to avail himself of his right of entry for other and distinct causes.<sup>857</sup>

Even where a stipulation is in the form of a condition with a right of entry reserved, the lease is valid until the lessor has exercised his option to terminate it.<sup>858</sup>

A reentry by the lessor for breach of condition terminates not only the estate of the lessee but that of any sublessee,<sup>859</sup> although in practice the lessor may often agree to substitute the under-tenant as his lessee.<sup>860</sup> But if the lessor himself prevent the performance of any covenant, he cannot enforce a forfeiture on the ground of a breach resulting from his action.<sup>861</sup> A negative covenant is equally effective to work a forfeiture with a positive one;<sup>862</sup> but a positive covenant differs from a negative one in this respect, that a permission to omit the positive duty is not a license within the meaning of the rule that a license once given dispenses with a condition in the lease connected with the covenant.<sup>863</sup>

<sup>857</sup> See *infra*, § 118.

<sup>858</sup> *Bemis v. Wilder*, 100 Mass. 446.

<sup>859</sup> 1 Wood, *Landl. & Ten.*, 2d ed., 157; *Foa, Landl. & Ten.* (1895) 513; *Wheeler v. Wood*, 25 Me. 287; *Evans v. Reed*, 5 Gray, 308; *G. W. Ry. Co. v. Smith*, 2 Ch. Div. 253; s. c., 3 App. Ca. 165. See *Healy v. Trant*, 15 Gray, 312; *Milkman v. Ordway*, 106 Mass. 232, 260; *Appleton v. Ames*, 150 Mass. 34, 42. The same result follows a notice to quit, see *infra*, § 145; but not a surrender, see *infra*, § 134.

A lease gave a right of reentry in case the lessee failed to keep his covenants or became insolvent. The lessee sublet a part of the premises and became insolvent, and the lessor thereupon put in a janitor and arranged that the lessee should act as agent to collect rent. The sublessee, both before and after notice of these facts, paid rent to the lessee who receipted therefor in his own name. It was *held* the lessor could dispossess the sublessee without being liable for the ouster. *Appleton v. Ames*, 150 Mass. 34.

For a form of bond with liquidated damages, to be valid in case the acts of the lessee should cause the lease to be terminated or the sublessee ousted, see *Guerin v. Stacy*, 175 Mass. 595.

<sup>860</sup> 1 Wood, *Landl. & Ten.*, 2d ed., 157; *Wheeler v. Wood*, 25 Me. 287; *McNeil v. Ames*, 120 Mass. 481, 485. See *Cooley v. Collins*, 186 Mass. 507. If the landlord does not adopt the sublessee as his tenant, he becomes a tenant at sufferance. *Evans v. Reed*, 5 Gray, 308; *Wheeler v. Wood*, 25 Me. 287.

<sup>861</sup> See *Borden v. Borden*, 5 Mass. 67; *Couch v. Ingersoll*, 2 Pick. 292.

<sup>862</sup> *Wheeler v. Earle*, 5 Cush. 31; *Miller v. Prescott*, 163 Mass. 12.

<sup>863</sup> 1 Taylor, *Landl. & Ten.*, 9th ed., § 286.



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The intention of the landlord to enter may be shown by any acts clearly showing such a purpose. Thus, where the tenants abandoned possession of a mine, and the landlords entered and occupied the ground and leased a portion of the same.<sup>864</sup> So going upon the land and cutting trees.<sup>865</sup> But a surrender does not necessarily operate as an entry for breach of condition, even though the tenant was in default at the time.<sup>866</sup>

§ 113. Who may enter.<sup>867</sup>—By the common law only the lessor or his heirs or executors could enter for breach of condition, because such right of entry was not assignable at common law. But by St. 32 Hen. VIII, c. 34, it was provided that grantees and assignees under a grant or assignment to or by any person and their heirs, executors, administrators and assigns, should have the like remedy against the lessees, their executors, administrators and assigns as the lessors and grantors, their heirs or successors might have had; and that the lessees and their assigns should have the same rights as to covenants in their favor. This is the present law in this State.<sup>868</sup>

An assignee of the lessor's estate may therefore enter for breach of condition.<sup>869</sup> But this is subject to two limitations. First, he can enter only for breach of "such conditions as are incident to the reversion, as rents, or for the benefit of the estate, as for not doing of waste, for keeping the houses in reparations; for making of fences, scouring of ditches, for preserving of woods, or such like; and not for the pay-

<sup>864</sup> Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80, 86.

<sup>865</sup> Dorrell v. Johnson, 17 Pick. 263, cited *infra*, § 181.

<sup>866</sup> Albani v. Evening Traveller Co., 220 Mass. 20, 26.

<sup>867</sup> *Cp. supra*, §§ 49, 54, 55.

<sup>868</sup> 1 Washb., Real Prop., 6th ed., §§ 652, 653; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80, 84; Howland v. Coffin, 12 Pick. 125; Patten v. Deshon, 1 Gray, 325, 326. *Cp.* Guild v. Richards, 16 Gray, 309, 318; Jones v. Parker, 163 Mass. 564, 568.

"The statute speaks of conditions, covenants and agreements contained in *indentures* of leases, demises and grants, language only applicable to sealed instruments." Field, J., in Sheets v. Selden's Lessee, 2 Wall. 177, 189.

<sup>869</sup> But an assignment of part of the reversion destroys the condition and the assignee may not enter, for the condition cannot be apportioned. Co. Lit. 215a; Dumpor's Case, 4 Co. 119b. But he can sue in covenant, Twynam v. Pickard, 2 B. & A. 105.



ment of any sum in gross, delivery of corn, wood or the like.”<sup>870</sup>

A covenant against underletting without consent has been held to be collateral and not within the statute.<sup>871</sup> So also a guaranty of rent.<sup>872</sup> A covenant to furnish the lessee with reasonable heat and light is “pretty near the line as it has been drawn between covenants that will and those that will not pass under the statute in respect of their nature.”<sup>873</sup> Whether a provision as to reëntury if the lessee becomes bankrupt is within the statute, *quære*.<sup>874</sup>

The second limitation on the power of the assignee to enter is that the purchaser from the lessor cannot enter for any breach of condition occurring before he became owner.<sup>875</sup>

§ 114. Notice of forfeiture.—Notice of intention to enforce a forfeiture by reëntury is usually dispensed with by the clause above-given.<sup>876</sup> The lessor may enter generally for condition broken, and may support such entry by evidence of the breach of any covenant. But if “the party making the entry super-adds to it a declaration of the specific grounds of the alleged forfeiture and cause of entry, he is bound by his specification, and restricted to the breach alleged as the occasion of his entry.”<sup>877</sup>

§ 115. Conveyance by tenant of larger estate than he possesses.—“A conveyance by a tenant for life or years which purports to grant a greater estate than he possesses or can lawfully convey shall not work a forfeiture of his estate, but shall pass to the grantee all the estate which such tenant can lawfully convey.”<sup>878</sup> Thus a lease in fee by one having a term

<sup>870</sup> Co. Lit. 215b; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80, 84.

<sup>871</sup> *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 84, per Chapman, J.

<sup>872</sup> *Walsh v. Packard*, 165 Mass. 189.

<sup>873</sup> *Jones v. Parker*, 163 Mass. 564, 568, per Holmes, J.

<sup>874</sup> See Crocker's Notes on Common Forms, 4th ed., 295, citing *Stevens v. Copp*, L. R., 4 Ex. 20; *Griffith v. Pritchard*, 5 B. & Ad. 765; *Hammon v. Colls*, 1 C. B. 916; *Hunter v. Galliers*, 2 T. R. 133; *Bridgman v. David*, 1 C. M. & R. 405.

<sup>875</sup> *Trask v. Wheeler*, 7 Allen, 109.

<sup>876</sup> *Fifty Associates v. Howland*, 5 Cush. 214.

<sup>877</sup> *Atkins v. Chilson*, 9 Met. 52.

<sup>878</sup> G. L., c. 184, § 9; R. L., c. 134, § 7; Pub. St., c. 126, § 7; Gen. St., c. 89, § 9; Rev. St., c. 59, § 6. Cited in *Hollenbeck v. McDonald*, 112 Mass.

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for nine hundred and ninety-nine years conveys only the interest of the grantor, but is good to the extent of the term.<sup>879</sup>

§ 116. **Manner of entry.**—The clause given above allowing the lessor to “expel and remove, forcibly if necessary, the lessee and those claiming under him and their effects,” is not void as being contrary to the statute in regard to forcible entry, because the use of a certain degree of force is lawful. On the other hand, this clause cannot authorize the use of a degree of force expressly prohibited by law.<sup>880</sup>

§ 117. **Relief against forfeiture.**—For the matter of relief against forfeiture in equity, see *infra*, §§ 123, 125, 126, 133, 285.

§ 118. **Waiver of right of entry.**<sup>881</sup>—The acceptance of rent falling due after the date of the breach relied upon is a waiver of the right to enter,<sup>882</sup> unless the lessor expressly states that the breach is not waived and reserves his right to enter.<sup>883</sup> But a waiver of one breach is not a waiver of another and distinct breach of the same covenant.<sup>884</sup>

By the rule in *Dumpor's Case*, which is apparently in force in this state, a condition against assigning without the consent of the lessor is discharged altogether by a permission to assign once given;<sup>885</sup> and the same is true of any negative, but not of any positive, covenant constituting a condition.<sup>886</sup> It is

247, 250. See *Stark v. Mansfield*, 178 Mass. 76. At common law the rule was otherwise. 4 Kent Com. 106.

<sup>879</sup> *Hollenbeck v. McDonald*, 112 Mass. 247.

<sup>880</sup> *Fifty Associates v. Howland*, 5 Cush. 214. As to what is a forcible entry see *infra*, § 299.

As to how far this is a defence to a claim for injuries inflicted in the process of entry, *quære*.

<sup>881</sup> See also *infra*, §§ 124, 127.

<sup>882</sup> See *infra*, § 124.

<sup>883</sup> *Miller v. Prescott*, 163 Mass. 12.

<sup>884</sup> *Seaver v. Coburn*, 10 Cush. 324.

<sup>885</sup> *Dumpor's Case*, 4 Rep. 119; *Pennock v. Lyons*, 118 Mass. 92. See 7 Am. Law Rev. 616.

If the lessee assigns with the consent of his lessor, a reassignment back to him without consent is valid. *McCormick v. Stowell*, 138 Mass. 431.

<sup>886</sup> 1 Taylor, Landl. & Ten., 9th ed., § 286. Mr. Taylor points out, also, in § 410, that it is only a mere condition which is discharged, and that, when there is a covenant with a proviso of forfeiture in case of breach (a frequent case), only the liability to forfeiture is ended. Thus in *Gannett v. Albree*, 103 Mass. 372, it was held that, where a covenant not to use a house for anything but a private dwelling was modified by consent,

therefore necessary in order to preserve the condition to insert the words given above, "notwithstanding any license or waiver of any prior breach of condition."

§ 119. Forfeiture for fraud.—Where the lessor has been induced to make a lease by fraud, as on the strength of a forged guaranty of the payment of rent, he is entitled upon discovery of the fraud to treat the lease as invalid, but it remains valid until avoided.<sup>887</sup>

§ 120. Forfeiture by disclaimer.—A lease may be forfeited not only by the lessee's violating some express condition contained in it, but by his expressly denying the landlord's title and claiming to hold under his own or some other title, or by his doing definite acts inconsistent with his former holding.<sup>888</sup> This principle obtains whether the tenancy be for years or at will,<sup>889</sup> consequently the following remarks of the court will apply here. "Where the tenant denies the title of his landlord, or does definite acts inconsistent with it, as by accepting a deed from some other than the landlord, and asserting title under it, the tenancy at will may be terminated by the landlord without any notice to quit. He may bring his action against the tenant as a disseisor, or trespasser, as if he had originally entered by wrong; or he may, if he can do so without violence, repossess himself of the premises. . . . No notice to quit is ever necessary unless the relation of landlord and tenant exists, and a disclaimer of tenancy dispenses with such notice. If one in as a tenant repudiates this relation, and denies that he holds under his landlord, the landlord may, at his own election, treat the tenancy as terminated."<sup>890</sup>

so that an assignee of the lessee might use rooms for sleeping rooms in connection with a school, yet the covenant remained in full force to prevent its use as a boarding-house.

<sup>887</sup> *Brooks v. Allen*, 146 Mass. 201. The giving of a notice to quit for non-payment of rent is not such an avoiding of the lease. *Ibid.* *Cp. supra*, § 35.

<sup>888</sup> 4 Kent, 106; *Co. Lit.* 251b; *Appleton v. Ames*, 150 Mass. 34, 44; *Peyton v. Smith*, 5 Pet. (U. S.) 485, 491; *Willison v. Watkins*, 3 Pet. (U. S.) 43, 48; *Zeller's Lessee v. Eckert*, 4 How. (U. S.) 289, 296; *Walden v. Bodley*, 14 Pet. (U. S.) 156, 162.

Such a disclaimer at the end of a term, however, prevents the landlord from collecting rent from the tenant thereafter as a tenant at sufferance. *Boston v. Binney*, 11 Pick. 1, 8.

<sup>889</sup> 4 Kent, 106; *Peyton v. Smith*, 5 Pet. (U. S.) 485, 491.

<sup>890</sup> *Appleton v. Ames*, 150 Mass. 34, 44, per Devens, J.

A good illustration of the effect of a disclaimer is found in the case of

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The disclaimer must be "a clear, positive and continued disclaimer and disavowal of the title, and the assertion of an adverse right, and to be brought home to the party,"<sup>891</sup> and the statute of limitations does not begin to run until assertion is made.<sup>892</sup>

§ 121. Forfeiture for non-payment of rent.—Necessity for a demand.—Non-payment of rent is frequently mentioned expressly as a clause of forfeiture.<sup>893</sup> "The courts always lean against penalties and forfeitures, therefore to entitle himself to recover the possession of the leased premises he [the landlord] must show that all the necessary forms which the law has prescribed have been scrupulously observed. There must be a demand for rent on the day it is due; at a convenient time before sunset. . . . Where no place of payment is named a tender upon the land is good and prevents forfeiture. And if the lessor desires to enforce a forfeiture he must demand the rent upon the leased premises at the most notorious place."<sup>894</sup> "Where there is condition of re-entry reserved for nonpayment of rent, the demand must be of the precise sum due; for if the demand be of a penny more, or penny less, it will be ill."<sup>895</sup> "The principle has been often applied to the cases of leasehold estates held upon condition of paying a stated rent at certain stipulated times, and a distinction made between a demand sufficient to authorize a distress to enforce the payment of rent, and a demand of the

a tenant at sufferance who claims to hold for himself or under an adverse title. The tenant by denying the title of the landlord raises a question of title which can not be tried in an action of *assumpsit* for use and occupation, and he is therefore not liable in such an action; but the landlord may resort to possessory remedies. *Allen v. Thayer*, 17 Mass. 299; *Merrill v. Bullock*, 105 Mass. 486, 490; *Fletcher v. McFarlane*, 12 Mass. 43; *Kittredge v. Peaslee*, 3 Allen, 235; *Boston v. Binney*, 11 Pick. 1; *Cobb v. Arnold*, 8 Met. 398; *Patch v. Loring*, 17 Pick. 336; *Mayo v. Shattuck*, 14 Pick. 533. *Cp. infra*, § 183.

<sup>891</sup> *Zeller's Lessee v. Eckert*, 4 How. (U. S.) 289, 296, per Nelson, J.

<sup>892</sup> *Ibid.*

<sup>893</sup> *Faxon v. Jones*, 176 Mass. 138.

<sup>894</sup> Per Colt, J., in *Chapman v. Harney*, 100 Mass. 353; *Kimball v. Rowland*, 6 Gray, 224; *Way v. Reed*, 6 Allen, 364, 371; *Connor v. Bradley*, 1 How. (U. S.) 211; *Prout v. Roby*, 15 Wall. (U. S.) 471; *Wildman v. Taylor*, 4 Ben. 42. See *Hartwell v. Kelly*, 117 Mass. 235.

<sup>895</sup> 1 Wms' *Saunders*, 286, note 16; *Connor v. Bradley*, 1 How. (U. S.) 211, 217.

rent when the whole lease was to be defeated upon failure to make payment, and the rule has been to require much greater precision in the form of the demand in the latter case, than in the former.”<sup>896</sup>

Therefore, when the time of paying rent is specified but the place of payment is not stated, the lessor cannot enforce a forfeiture without proving a demand for rent upon the premises, or a waiver of such demand by the lessee.<sup>897</sup> But a reply of the lessee to a demand made at *another* place, that he cannot pay the rent is not such a waiver;<sup>898</sup> and, as we have seen above, a clause is usually inserted waiving any notice or demand before entry.<sup>899</sup> Sometimes the provision is that, in case of non-payment of rent, the lessor may enter without “any further demand.” This has been construed to mean without any demand at all.<sup>900</sup> It may be noted at this point that a demand for rent due is necessary only previous to a reëntry and forfeiture of the term. It is the tenant’s duty to pay his rent without any demand, and previous to any other action by the landlord less severe than reëntry, such as an action for rent,<sup>901</sup> or a notice to quit,<sup>902</sup> no demand is necessary.

Where a reëntry is properly made, the effect is to destroy the leasehold estate and to revert the whole right to possession in the lessor.<sup>903</sup>

And, where entry is made for a breach then existing, the fact that prior breaches had occurred is immaterial.<sup>904</sup>

If a lessee desires to resist forfeiture on the ground of his rights under a mortgage, made on the same day as the lease, he must set up in his answer and prove such title in derogation of his lessor’s title.<sup>905</sup>

§ 122. Effect of condition.—As was stated generally in the last section, the mere failure to pay rent does not of itself determine the tenancy, and the provision for entry is a con-

<sup>896</sup> Dewey, J., in *Bradstreet v. Clark*, 21 Pick. 389, 396.

<sup>897</sup> *Chapman v. Harney*, 100 Mass. 353.

<sup>898</sup> *Ibid.*

<sup>899</sup> *Supra*, §§ 112, 118; *Fifty Associates v. Howland*, 5 Cush. 214.

<sup>900</sup> *Fifty Associates v. Howland*, 5 Cush. 214.

<sup>901</sup> *Infra*, § 239.

<sup>902</sup> *Infra*, §§ 145, 161.

<sup>903</sup> *McNamara v. Dorey*, 219 Mass. 151, 154.

<sup>904</sup> *McNamara v. Dorey*, 219 Mass. 151, 155.

<sup>905</sup> *Ibid.*



occupy,—and the tenant remains until he is ejected, he is liable for rent at the same rate until he is actually expelled.<sup>915</sup>

§ 123. **Relief against forfeiture.**—It is settled law that courts of equity may stay proceedings by writ of entry to enforce a forfeiture for non-payment of rent, in a proper case.<sup>916</sup> Such a case is where, by accident or mistake, the tenant has tendered rent several days before it is due.<sup>917</sup> This is on the theory that in equity the landlord's right of reënty is given as security for the payment of rent, and, on the rent being paid with interest for the delay, the very thing is done for which the security is given.<sup>918</sup> But, where the failure to pay rent is a wilful omission on the part of the tenant, all arrears of rent, interest and costs must be paid or tendered.<sup>919</sup>

§ 124. **Waiver of right of entry.**<sup>920</sup>—If the lessor have any rights other than the mere collection of rent, he will waive them by accepting rent subsequently due,<sup>921</sup> unless this right of entry is expressly reserved.<sup>922</sup> Where rent is payable in a peculiar commodity hard to obtain, the lessor has the right to insist upon obtaining the commodity agreed upon; but he will lose his right to make such a demand if he does not give due notice of his intention, so that the lessee may have a reasonable time to procure the article.<sup>923</sup>

§ 125. **Forfeiture for non-payment of taxes.**—The failure to pay taxes as agreed is a cause of forfeiture, in the same way as the failure to pay the agreed rent. Nevertheless, where the failure is due not to bad faith but to negligence, and the lessor has not been injured, equity will enjoin a forfeiture upon payment of costs and counsel fees. In such a case, the for-

<sup>915</sup> *Sutton v. Goodman*, 194 Mass. 389, 395.

<sup>916</sup> *Cp. supra*, § 117.

<sup>917</sup> *Atkins v. Chilson*, 11 Met. 112 (where an equitable defence was allowed at law); *Sheets v. Selden*, 7 Wall. (U. S.) 416, 422.

See on the powers of equity to enjoin forfeiture, *Walker v. Brooks*, 125 Mass. 241; *Florence Co. v. Grover & Baker Co.*, 110 Mass. 1; also *Gould v. Bugbee*, 6 Gray, 371, 375 and *infra*. § 285.

<sup>918</sup> *Gordon v. Richardson*, 185 Mass. 492.

<sup>919</sup> *Sheets v. Selden*, 7 Wall. (U. S.) 416, 422. See generally 2 Taylor, *Landl. & Ten.*, 9th ed., §§ 495, 496.

<sup>920</sup> See also *supra*, § 118.

<sup>921</sup> *Bartlett v. Greenleaf*, 11 Gray, 98.

<sup>922</sup> *Miller v. Prescott*, 163 Mass. 12.

<sup>923</sup> *Lilley v. Fifty Associates*, 101 Mass. 432.

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feiture is merely security for the payment.<sup>924</sup> But a lessee is not entitled to relief after the leased premises have been sold for non-payment of taxes, so that the performance of the covenant is at an end, in the absence of accident or mistake.<sup>925</sup>

Where a lease provides that the lessee shall pay water rates, if there be several tenants and one meter, and the lessor makes no attempt to apportion the rates for the whole building, he cannot enter and terminate the lease for non-payment of water rates.<sup>926</sup>

§ 126. Forfeiture for assigning or underletting.<sup>927</sup>—“And will not assign or underlet the whole or any part of said premises without first obtaining on each occasion the consent in writing of the lessor.”

As we have seen above,<sup>928</sup> an assignment contrary to the provisions of this covenant does not determine the lease without entry by the lessor.<sup>929</sup> Where there has been an alienation with the consent of the lessor, the condition is fulfilled, and a subsequent transfer without the lessor's consent is no breach, unless an express provision to the contrary is inserted.<sup>930</sup>

As we have seen,<sup>931</sup> an assignee who takes an estate by operation of law takes it free from the covenant as to assignment. It is therefore usual and proper to insert in the condition of the lease a clause giving the landlord the right to enter in case of a taking “by process of law, by proceedings in bankruptcy, or insolvency, or otherwise.” Where there has been a forfeiture for this cause, equity will not usually grant relief.<sup>932</sup>

<sup>924</sup> *Gordon v. Richardson*, 185 Mass. 492.

<sup>925</sup> *Ibid.*

<sup>926</sup> *Harford v. Taylor*, 181 Mass. 266.

<sup>927</sup> See on this general subject, 7 Am. Law Rev. 240; *ibid.* 616.

<sup>928</sup> § 112.

<sup>929</sup> *Shattuck v. Lovejoy*, 8 Gray, 204.

Bigelow, J., said, p. 205: “The remedy for such breach was either by an action for damages against the lessees, or under the clause in the lease which gave the right to re-enter and expel the lessees or those claiming under them, in case they committed a breach of the covenants.” *Cp. Marion St. Garage Co. v. Sugden*, 229 Mass. 130, 134.

<sup>930</sup> *Pennock v. Lyons*, 118 Mass. 92.

This is commonly known as the rule in *Dumpor's Case*, 4 Rep. 119. See further on this subject, *supra*, § 118.

<sup>931</sup> *Supra*, § 75.

<sup>932</sup> *Hill v. Barclay*, 18 Ves. 56. *Cp. infra*, § 285.



§ 127. **Waiver of right of entry.**—The right of entry is waived by the lessor if he accepts rent with knowledge of the assignment or sublease.<sup>933</sup> Whether a written consent for the tenant to “underlet” entitles him to *assign* his interest in the premises, *quære*; but no objection can be made where the lessor accepts rent from the assignee due or payable, after knowledge of such assignment.<sup>934</sup> Thus, a receipt for rent given by the lessor to the assignee, and referring to the lease so as to identify it, is evidence that the lessor has knowledge of the assignment, and has received the defendant as his tenant.<sup>935</sup>

So it was held a waiver where lessees became incorporated, assigned the lease to the corporation, and the corporation occupied and paid rent to the lessor, who opened an account with it upon his books.<sup>936</sup> The right of entry for underletting may be waived by the failure of the lessor for a number of years to enforce a forfeiture for that cause,<sup>937</sup> but not by the waiver of a prior and distinct breach.<sup>938</sup>

After a waiver, entrance of the lessor upon the premises and interference with the tenant’s possession are, of course, unlawful,<sup>939</sup> and the latter may maintain an action at law for damages or such relief in equity in a proper case.<sup>940</sup>

§ 128. **Forfeiture for illegal use.**—“And no trade or occupation shall be carried on upon the said premises, or use made thereof which shall be unlawful, improper, noisy, offensive or contrary to any law of the Commonwealth or ordinance for the time being in force of the [City of Boston].”<sup>941</sup> Such a covenant is included in a provision that the lessor may enter for neglect or failure to perform any or either of the covenants of the lease.<sup>942</sup>

<sup>933</sup> *Porter v. Merrill*, 124 Mass. 534; *Blake v. Sanderson*, 1 Gray, 332; *Carpenter v. Pocasset Mfg. Co.*, 180 Mass. 130; *Nelson Theatre Co. v. Nelson*, 216 Mass. 30, 34; *O’Keefe v. Kennedy*, 3 Cush. 325.

<sup>934</sup> *O’Keefe v. Kennedy*, 3 Cush. 325, and *supra*, § 75.

<sup>935</sup> *O’Keefe v. Kennedy*, 3 Cush. 325.

<sup>936</sup> *Carpenter v. Pocasset Mfg. Co.*, 180 Mass. 130.

<sup>937</sup> *Milkman v. Ordway*, 106 Mass. 232, 259.

<sup>938</sup> *Seaver v. Coburn*, 10 Cush. 324.

<sup>939</sup> *Nelson Theatre Co. v. Nelson*, 216 Mass. 30, 34.

<sup>940</sup> *Ibid.*

<sup>941</sup> *Cp. supra*, § 108.

<sup>942</sup> *Wheeler v. Earle*, 5 Cush. 31. “The question of fact will be whether

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Owing to the principle that a right of entry is not assignable, a grantee of the reversion cannot enforce a forfeiture for an illegal use which had ceased before he acquired title, the prior owner having done nothing to avoid the lease.<sup>943</sup> On the other hand, if the lease was void at the start because it was contemplated that the premises should be used for an illegal purpose, a subsequent assignment of it by the lessee will not make it valid.<sup>944</sup>

The fact that the premises are used for an unlawful purpose without the knowledge of the lessor will not excuse the tenant from his covenants, and from the payment of rent.<sup>945</sup>

§ 129. General statutory provisions.—General Laws, c. 139, § 14, provides the "Every building, place or tenement which is resorted to for illegal gaming, or which is used for the illegal keeping or sale of intoxicating liquors, shall be deemed a common nuisance."<sup>946</sup> An indictment under this section is not supported by proof of an offense under section twenty of the same chapter,<sup>947</sup> namely, leasing with knowledge that the lessee intended to use and did use the premises for illegal purposes. Nor is it supported by proof that the defendant, who was a servant of the lessee of the premises, made illegal sales of liquor in the presence or under the direct personal supervision of his employer.<sup>948</sup>

General Laws, c. 139, § 19, provides that "If a tenant or occupant of a building or tenement, under a lawful title, uses such premises or any part thereof for the purposes of prostitution, assignation, lewdness, illegal gaming, or the illegal keeping the defendant by himself or through his subtenants has occupied the premises leased or any part of them 'for an unlawful purpose.'" Per Dewey, J. (Case of disorderly house.)

<sup>943</sup> Trask v. Wheeler, 7 Allen, 109.

<sup>944</sup> Sherman v. Wilder, 106 Mass. 539.

<sup>945</sup> Way v. Reed, 6 Allen, 364, 370.

<sup>946</sup> G. L., c. 139, § 14; R. L., c. 101, §§ 6, 8; Pub. St., c. 101, § 6; Gen. St., c. 87, § 6; St. 1855, c. 405, § 1. See Chase v. Proprietors of Revere House, 232 Mass. 88. As to evidence, see G. L., c. 138, § 60; c. 139, § 17; R. L., c. 100, §§ 65, 66; c. 101, § 9; St. 1887, c. 414.

As to equity powers in regard to these matters, see G. L., c. 139, §§ 6, 16; R. L., c. 101, § 8; St. 1887, c. 380; St. 1895, c. 419, § 10; also Carlton v. Rugg, 149 Mass. 550; Cheney v. Coughlin, 201 Mass. 204.

As to bucket shops, see G. L., c. 271, §§ 35-38.

<sup>947</sup> See *infra*.

<sup>948</sup> Commonwealth v. Churchill, 136 Mass. 149.

or sale of intoxicating liquors, such use shall at the election of the lessor or owner annul and make void the lease or other title under which such tenant or occupant holds and, without any act of the lessor or owner, shall cause the right of possession to revert and vest in him, and he may, without process of law, make immediate entry upon the premises, or may avail himself of the remedy provided in chapter two hundred and thirty-nine.”<sup>949</sup> “Such use annuls and makes void [voidable] the lease and without any act of the owner causes the right of possession to revert and vest in him. He may, without process of law, make immediate entry, or avail himself of the remedy sought in this case. After notice of such use, he is required under severe penalties to take measures to eject the occupant. These stringent provisions imply that no notice is necessary to the tenant before commencing this process.”<sup>950</sup>

General Laws, c. 139, § 19, provides that the landlord can recover possession by entry, or by action of summary process, if the tenant uses the building for the illegal purposes described therein; but, unless there are special provisions in the lease, the landlord cannot in any other manner prevent the tenant from using the building for these illegal purposes.”<sup>951</sup> Upon such illegal use, the landlord may therefore either enter at once without notice, or may bring summary process against the tenant; but he may refrain from exercising his rights, and, so long as he does refrain, the lease is valid against the tenant and all other persons.<sup>952</sup> “If it were to be held that the lease is thus made void, against the will of the landlord, any tenant desiring to get rid of his lease might do so simply by violating the statute. The provision must be regarded as made for the benefit of the landlord, who may avail himself of it but is not obliged to do so.”<sup>953</sup>

<sup>949</sup> G. L., c. 139, § 19; R. L., c. 101, § 10; Pub. St., c. 101, § 8; Gen. St., c. 87, § 8; St. 1855, c. 405, § 3.

Cited in *Healy v. Trant*, 15 Gray, 312 (liquors and house of ill fame); *Way v. Reed*, 6 Allen, 370; *Trask v. Wheeler*, 7 Allen, 110; *O’Connell v. McGrath*, 14 Allen, 289; *Prescott v. Kyle*, 103 Mass. 382 (liquors); *Commonwealth v. Wentworth*, 146 Mass. 37; *Commonwealth v. Kane*, 173 Mass. 477 (opium); *Chase v. Proprietors of Revere House*, 232 Mass. 88.

<sup>950</sup> *Colt, J.*, in *Prescott v. Kyle*, 103 Mass. 381, 382.

<sup>951</sup> *Field, J.*, in *Commonwealth v. Wentworth*, 146 Mass. 36, 37.

<sup>952</sup> *Trask v. Wheeler*, 7 Allen, 109. (Case of gaming and illegal keeping of liquors.)

<sup>953</sup> *Ibid.*, per *Chapman, J.*

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It is also provided that "Every building, part of a building, tenement or place used for prostitution, assignation or lewdness, and every place within or upon which acts of prostitution, assignation or lewdness are held or occur, shall be deemed a nuisance."<sup>954</sup> Such place may be closed and the person maintaining it perpetually enjoined by a proceeding in equity brought by the public prosecuting attorney or any private citizen.<sup>955</sup>

Where the premises or a portion of them are sublet, and the sublessor has no knowledge of the illegal use, the sublease only is forfeited. The word "owner" in this section of the statute "does not mean the person in whom the fee of the estate is vested but the owner of the lawful title under which the tenant or occupant enjoys the estate."<sup>956</sup> Similarly, illegal use of the premises by an assignee of a lessee will not discharge one of the original lessees, who is described in the lease as a surety, where the lessor is actually ignorant of the use to which the premises are being put.<sup>957</sup> Bigelow, C. J., said of this section: "The sole object of the enactment was for the benefit and protection of the lessor to enable him to get rid of a tenant who was using the demised premises for an unlawful purpose, and to avoid the penalty imposed by the following section on a lessor who knowingly lets his estate to be occupied for a purpose prohibited by law. It would be a perversion of the plain intent of the statute to construe it as affording a ground of defense to a claim for rent or premises under a lease which was not made with any design on the part of the lessor that they should be appropriated to an illegal use. Besides, there is no evidence in the case to show that the plaintiff had any such knowledge of the mode in which the estate was occupied by the assignee as to make him a participator in the unlawful use of the premises by the tenant. To deprive the lessor of his right to recover rent, it would be necessary to show actual and not merely constructive knowledge of the illegal occupation of the demised premises."<sup>958</sup>

General Laws, c. 139, § 20, provide that "Whoever know-

<sup>954</sup> G. L., c. 139, § 4. See § 131.

<sup>955</sup> *Ibid.*

<sup>956</sup> *Healy v. Trant*, 15 Gray, 312; *O'Connell v. McGrath*, 14 Allen, 289. See also *Prescott v. Kyle*, 103 Mass. 381.

<sup>957</sup> *Way v. Reed*, 6 Allen, 370.

<sup>958</sup> *Way v. Reed*, 6 Allen, 370, 371.

ingly lets premises owned by him, or under his control, for the purposes of prostitution, assignation, lewdness, illegal gaming, or the illegal keeping or sale of intoxicating liquors, or knowingly permits such premises, while under his control, to be used for such purposes, or after due notice of any such use omits to take all reasonable measures to eject therefrom the persons occupying the same as soon as it can lawfully be done, shall be punished," etc.<sup>959</sup> "[The lease] was made by the defendant with the knowledge that the premises were to be used for an illegal purpose which by the statute made it a common nuisance. The act of making the lease subjected him to punishment as guilty of aiding in the maintenance of a nuisance. The defendant knowingly permitted such illegal use after making the alleged lease. Under the circumstances a court must be justified in finding that he was a participator in such use. Otherwise a lessee might intentionally devote the premises to an unlawful use through his under-tenant. By the same statutes such use annuls and makes void the lease, and without any act of the owner causes the right of possession to revert and to vest in him. He may without process of law, make immediate entry or avail himself of the remedy sought in this case [summary process]. After notice of such use, he is required under severe penalties to take measures to eject the occupant. These stringent provisions imply that no notice is necessary to the tenant before commencing this process. The continuance of a nuisance is not protected by the law which requires notice to terminate a tenancy for non-payment of rent or entry for breach of condition."<sup>960</sup> So a surety cannot set up in defence to a claim for rent that he is discharged by an

<sup>959</sup> G. L., c. 139, § 20; R. L., c. 101, § 11; Pub. St., c. 101, § 9; Gen. St., c. 87, § 9; St. 1855, c. 405, § 4.

Cited in *Prescott v. Kyle*, 103 Mass. 381; *Sherman v. Wilder*, 106 Mass. 539; *Commonwealth v. Bossidy*, 112 Mass. 277; *Commonwealth v. Churchill*, 136 Mass. 148; *Commonwealth v. Goulding*, 135 Mass. 552; *Commonwealth v. Bartley*, 138 Mass. 181; *Commonwealth v. Wentworth*, 146 Mass. 36; *Commonwealth v. Kane*, 173 Mass. 477; *Commonwealth v. La Pointe*, 228 Mass. 266; *Chase v. Proprietors of Revere House*, 232 Mass. 88, 97. See also, as to colorable leases, *Commonwealth v. Locke*, 148 Mass. 125.

<sup>960</sup> Per Colt, J., in *Prescott v. Kyle*, 103 Mass. 381, citing *Trask v. Wheeler*, 7 Allen, 109; *Way v. Reed*, 6 Allen, 364, 370; *Taylor, Landl. & Ten.*, § 521; *Healy v. Trant*, 15 Gray, 312.

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illegal use of the premises where the lease was not made with any design on the part of the lessor that they should be appropriated to an illegal use.<sup>961</sup>

Under this section, a landlord cannot be indicted as being in "control," where there is proof that a tenant is in possession under a lease.<sup>962</sup> The failure of an indictment under this section to allege that the defendant maintains or aids in maintaining a nuisance, or that the tenement is a common nuisance, is a formal defect if it is alleged that the defendant having control permitted illegal gaming. So also is the fact that the possibility of some other person having control of the premises for part of the day on which they were used for gaming. It is too late also to raise such objections on appeal.<sup>963</sup> Proof of the commission of an offence under this section will not support an indictment under R. L., c. 101, §§ 6, 7, for maintaining a tenement used for the illegal sale of intoxicating liquors.<sup>964</sup> Similarly an indictment for letting "a building" which the tenant used for illegal purpose, and failing to eject the latter, is not sustained by evidence proving the letting of a single apartment in the building.<sup>965</sup>

Parol evidence is admissible to show an intention that leased premises should be used unlawfully, and that they were so used; and an express covenant that the lessee will make no unlawful use of the premises will not prevent the lease from being voidable under such circumstances.<sup>966</sup> So, evidence that the tenement was used with the lessor's knowledge as a saloon where intoxicating liquors were sold and drunk, is admissible, without proof whether the occupant at the time of such use of it was licensed to sell intoxicating liquors in any lawful manner. So also, the conduct and declarations of the lessor both before and after as well as at the time of giving the lease are admissible.<sup>967</sup> A complaint under this section

<sup>961</sup> *Way v. Reed*, 6 Allen, 371. *Cp. supra*.

<sup>962</sup> *Commonwealth v. Wentworth*, 146 Mass. 36; *Commonwealth v. La Pointe*, 228 Mass. 266, 268.

<sup>963</sup> *Commonwealth v. Goulding*, 135 Mass. 552.

<sup>964</sup> *Commonwealth v. Churchill*, 136 Mass. 148.

<sup>965</sup> *Commonwealth v. Bossidy*, 112 Mass. 277. See also *Commonwealth v. McCaughey*, 9 Gray, 296; and *cp. Commonwealth v. Shattuck*, 14 Gray, 23.

<sup>966</sup> *Sherman v. Wilder*, 106 Mass. 537.

<sup>967</sup> *Ibid*.

should aver that the tenement was used by some third person named or unknown, other than the defendant.<sup>968</sup>

Where a lease was originally made with the intention that the premises should be used for an unlawful purpose, the fact that the lessee assigns does not remove the taint of illegality.<sup>969</sup>

§ 130. Intoxicating liquors.—The provisions of law as to the keeping and sale of intoxicating liquors are found in G. L., c. 138.

§ 79 provides that where a tenant is convicted of the illegal keeping or sale of intoxicating liquor, a notice shall be served upon the owner, or agent of such owner in charge of the building, and shall be a sufficient notice to render him liable to the penalties provided in G. L., c. 139, § 20, for knowingly letting a building for such purpose.<sup>970</sup>

§ 49 makes the occupant or owner liable for damages caused by a person who has become intoxicated by sales of liquor on the premises; but the lessor is not liable, if the occupant holds a license.<sup>971</sup> This provision is constitutional.<sup>972</sup>

§ 50 provides that, where an owner or lessor pays under the preceding section, he may recover what he has paid from the tenant in an action of contract.<sup>973</sup>

§ 131. Sexual immorality.—“Every building, part of a building, tenement or place used for prostitution, assignation or lewdness, and every place within or upon which acts of prostitution, assignation or lewdness are held or occur, shall be deemed a nuisance.”<sup>974</sup> The district attorney or attorney general, or one or more citizens may bring a bill to enjoin the nuisance against the persons maintaining it and the owner, lessee or agent of the building or place where it occurs.<sup>975</sup> If

<sup>968</sup> *Commonwealth v. Bartley*, 138 Mass. 181.

<sup>969</sup> *Sherman v. Wilder*, 106 Mass. 537.

<sup>970</sup> G. L., c. 138, § 79; R. L., c. 100, § 57; Pub. St., c. 100, § 20; St. 1876, c. 162, § 16. Cited in *Commonwealth v. Wentworth*, 146 Mass. 38.

<sup>971</sup> G. L., c. 138, § 49; R. L., c. 100, § 58; Pub. St., c. 100, § 21; St. 1879, c. 297, § 1; St. 1880, c. 256, § 1.

<sup>972</sup> *Howes v. Maxwell*, 157 Mass. 334.

<sup>973</sup> G. L., c. 138, § 50; R. L., c. 100, § 59; Pub. St., c. 100, § 22; St. 1879, c. 297, § 3.

<sup>974</sup> G. L., c. 139, § 4. This statute is constitutional. *Chase v. Proprietors of Revere House*, 232 Mass. 88.

<sup>975</sup> G. L., c. 139, § 6. Cited in *Chase v. Proprietors of Revere House*, 232 Mass. 88.

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<sup>232</sup> Mass. 88.

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<sup>978</sup> *Ibid.*

<sup>979</sup> *Ibid.* Cf. G.

<sup>980</sup> *Ibid.*

<sup>981</sup> *Ibid.*, p. 95.

<sup>982</sup> G. L., c. 139

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<sup>984</sup> Commonwea

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<sup>985</sup> G. L., c. 272

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apply to this matter also, and the use of the premises for such purposes make the lease void, and the lessor may immediately reënter or bring summary process.

General Laws, c. 272, § 6, provide that "Whoever, being the owner of a place or having or assisting in the management or control thereof, induces or knowingly suffers a female to resort to or be in or upon such place, for the purpose of unlawfully having sexual intercourse," shall be punished by imprisonment in the state prison for not more than three years or in jail or the house of correction for not more than two and one-half years or by a fine of not more than one thousand dollars, or by both such fine and imprisonment in jail or the house of correction.<sup>986</sup>

§ 132. **Illegal gaming.**—Every building, place or tenement which is resorted to for illegal gaming, shall be deemed a common nuisance.<sup>986a</sup> The knowingly letting of premises for the purpose of conducting illegal gaming therein, is illegal and renders the lease voidable.<sup>987</sup> The owners, tenants or occupants of houses or buildings in which unlawful gaming, betting, pool selling and lotteries are conducted or knowingly permitted by them are also liable to severe penalties.<sup>988</sup> But these penalties are personal merely, and consequently the use of a building for a lottery does not affect a collateral agreement made by the owner or lessee, such as an insurance policy upon the house or the goods therein.<sup>989</sup>

§ 133. **Forfeiture for other causes.**—There may also be a forfeiture of the lessee's estate because of a breach of the covenant to insure, to repair or against waste.

In such cases, equity will not ordinarily relieve against a forfeiture.<sup>990</sup>

<sup>986</sup> G. L., c. 272, § 3; R. L., c. 212, § 6; St., 1886, c. 329, § 5.

<sup>986a</sup> G. L., c. 139, § 14.

<sup>987</sup> G. L., c. 139, § 19; R. L., c. 101, § 10. See *supra*, § 129.

<sup>988</sup> G. L., c. 137, §§ 1, 2; c. 139, § 6; c. 271, §§ 5, 8, 17, 18, 19; R. L., c. 99, § 2; c. 101, § 8; c. 214, §§ 5, 8, 17, 18, 19; Pub. St., c. 99, §§ 2, 8; c. 209, § 2; St. 1885, c. 342; St. 1892, c. 409; St. 1895, c. 419; *Kemp v. Hammond Hotels*, 226 Mass. 409.

As to removal of obstructions, etc., from suspicious buildings, see G. L., c. 271, §§ 25, 26. As to bucket shops, see G. L., c. 271, §§ 35, 38.

<sup>989</sup> *Boardman v. Merrimack Fire Ins. Co.*, 8 Cush. 583.

<sup>990</sup> *Gordon v. Richardson*, 185 Mass. 492; *Mactier v. Osborn*, 146 Mass. 399, 402. Cp. *Lundin v. Schoeffel*, 167 Mass. 465, 469, and *infra*, § 285.

## § 134 TENANCY FOR YEARS UNDER A WRITTEN LEASE

§ 134. Surrender.<sup>991</sup>—The General Laws provide that “no estate or interest in land shall be . . . surrendered unless by [an instrument in writing signed by the grantor or by his attorney], or by operation of law.”<sup>992</sup>

A surrender is equally good, though made through an agent of the lessor without written authority to make the lease or to accept a surrender,<sup>993</sup> and may be made by the representative of a deceased lessee.<sup>994</sup>

But where a lease for five years provides that the lessee may surrender at the end of three years by giving notice of his intention in writing, he must not only give the notice but must cease to occupy at the end of the three years; otherwise the lease continues to the end of its term.<sup>995</sup>

A surrender does not necessarily operate as an entry for breach of condition, even though at the time there had been breaches which would have justified such an entry.<sup>996</sup>

“A sublessee is not affected by the voluntary surrender of the lease by his mesne landlord to the superior landlord, nor, if he has knowledge of it, is he bound in any way to treat it as a notice to quit,”<sup>997</sup> even though the lease at the time be subject to forfeiture.<sup>998</sup> It seems, also, that a sublessee may have an injunction in equity to prevent a lessee from voluntarily surrendering his lease, where the latter had entered into an agreement with the sublessee which practically amounts to

<sup>991</sup> *Cp.* Tenancy at Will, *infra*, § 177.

<sup>992</sup> G. L., c. 183, § 3; R. L., c. 127, § 3; Pub. St., c. 120, § 3; Gen. St., c. 89, § 2; Rev. St., c. 59, § 29; St. 1783, c. 37, § 1. For citations on this statute, see *supra*, § 18.

A surrender differs from a release in that it is a falling of a less estate into a greater, while in a release the greater estate is given to the one having the less estate. 2 Taylor, Landl. & Ten., 9th ed., § 507.

<sup>993</sup> *Amory v. Kannoisky*, 117 Mass. 351.

<sup>994</sup> *Deane v. Caldwell*, 127 Mass. 242.

<sup>995</sup> *Pope v. Abbott*, 211 Mass. 583.

<sup>996</sup> *Albiani v. Evening Traveller Co.*, 220 Mass. 20, 26.

<sup>997</sup> *Woodfall*, Landl. & Ten., 16th ed., 278; 2 *Wood*, Landl. & Ten., 2d ed., 1181; Taylor, Landl. & Ten., 9th ed., §§ 111, 517; *Albiani v. Evening Traveller Co.*, 220 Mass. 20, 27; *Mellor v. Watkins*, L. R., 9 Q. B. 400; *Pleasant v. Benson*, 14 East, 234; *Spicer v. Martin*, 14 App. Ca. 12; *Adams v. Goddard*, 48 Me. 212.

<sup>998</sup> *Great Western Ry. Co. v. Smith*, 2 Ch. Div. 235; s. c., 3 App. Cas. 165.

a trust of the term;<sup>999</sup> and the lessee cannot set up that the sublease was in violation of a covenant not to underlet.<sup>1000</sup>

And, when a sublessee is entitled to a renewal, this right is not affected by the surrender;<sup>1001</sup> and the sublessee may enforce it in equity against the owner for specific performance or damages.<sup>1002</sup>

How far a sublessee is discharged from liability to pay rent after a surrender by the lessee, *quære*. By the surrender the lessee parts with the reversion, while on the other hand the reversion is extinguished by merger in the fee held by the lessor. "Inequitable as this result would be, there is certainly authority for the proposition, that where a lessee technically surrenders to his landlord, having had authority to grant and having granted a sublease of a portion of the premises, this surrender not only fails to prejudice the sublessee, but releases him, for the reasons stated, from the payment."<sup>1003</sup> A sublessee may, of course, assent to an entry of the landlord and to his own dispossession thereby; and payment of rent thereafter to an agent of the landlord is strong evidence of such assent.<sup>1004</sup>

§ 135. By operation of law.—A surrender "by operation of law" take place "where by agreement between the lessor and lessee, the lessee abandons his possession, and the lessor resumes possession of the premises."<sup>1005</sup> But a breach of

<sup>999</sup> *Milkman v. Ordway*, 106 Mass. 232, 259.

<sup>1000</sup> *Ibid.*, p. 260.

<sup>1001</sup> *Albiani v. Evening Traveller Co.*, 220 Mass. 20, 27.

<sup>1002</sup> *Ibid.*

<sup>1003</sup> *Appleton v. Ames*, 150 Mass. 34, 42, per Devens, J., citing *Webb v. Russell*, 3 T. R. 393; *Grundin v. Carter*, 99 Mass. 15; 2 Taylor, Landl. & Ten., 9th ed., §§ 517, 518. See also 4 Kent Com. 104.

In England, this result was changed by St. 4 Geo. II, c. 28. Whether this act extended to this country, *quære*. *Atkins v. Chilson*, 11 Met. 112, 120. *Cp. Gordon v. Richardson*, 185 Mass. 492, 494. In some states it has been expressly reenacted.

<sup>1004</sup> *Appleton v. Ames*, 150 Mass. 34, 42.

<sup>1005</sup> *Endicott, J.*, in *Amory v. Kannoisky*, 117 Mass. 351; *Talbot v. Whipple*, 14 Allen, 177, 180; *Taylor v. Kennedy*, 228 Mass. 390, 392. The facts in the first case were that the tenant underlet to one M, and for a month both he and M paid rent. The tenant then told the lessor that if the latter received rent from M he must release him from liability. The lessor said he should continue to take rent from M and that lessee could give up his lease, and he refunded the rent which the lessee had paid. Lessor continued to receive rent from M. For a case where the facts

## § 135 TENANCY FOR YEARS UNDER A WRITTEN LEASE

covenants by the lessee is not, *per se*, evidence of an abandonment of the lease.<sup>1006</sup>

A conveyance of his interest by the lessee to the lessor, by an instrument in the form of the lease originally made, amounts to a surrender of his interest and a merger of the term;<sup>1007</sup> but a clause in a lease to the effect that the lessee agrees to surrender the premises, on three months' notice and a payment of a certain sum, does not provide for a termination on notice and tender, being only a covenant.<sup>1008</sup> So also, a lease by a tenant for years to the remainder-man, and the reservation of a right to erect houses on the premises, will not prevent a merger.<sup>1009</sup> Where the lessee has made various subleases, and then surrenders his lease assigning the subleases to the lessor, and the lessor accepts the surrender of the lease "without prejudice to the leases of parts of the premises assigned to him," the subleases remain in full force.<sup>1010</sup>

Although the statute of frauds above cited provides that a surrender must be in writing, though not under seal, yet as a practical matter this is not necessary, because a verbal agreement may have the effect of a surrender by operation of law, if it be accompanied by some action of the landlord indicating an acceptance of the surrender.<sup>1011</sup> Thus, in an action for rent, evidence of an oral agreement, contemporaneous with the making of the lease, that the lessee might surrender the premises at any time, is inadmissible so far as it tends to prove such agreement, but competent so far as throwing light on facts which the lessee claimed constituted a surrender.<sup>1012</sup>

Indeed, there need not be any express agreement at all, but "any acts which are equivalent to an agreement on the part of a tenant to abandon and on the part of the landlord to

were held to show no surrender, see *Appleton v. O'Donnell*, 173 Mass. 398.

<sup>1006</sup> *Commonwealth v. Eliot*, 146 Mass. 5.

<sup>1007</sup> *Shepard v. Spaulding*, 4 Met. 416.

<sup>1008</sup> *Wheeler v. Dascomb*, 3 Cush. 285.

<sup>1009</sup> *Pyncheon v. Stearns*, 11 Met. 304, 309.

<sup>1010</sup> *Beal v. Boston Car Spring Co.*, 125 Mass. 157. See also *Appleton v. Ames*, 150 Mass. 34, 43; *Albiani v. Evening Traveller Co.*, 220 Mass. 20, 27.

<sup>1011</sup> *Hanham v. Sherman*, 114 Mass. 19; *Philadelphia, etc., Iron Co. v. Boston*, 211 Mass. 526.

<sup>1012</sup> *McGlynn v. Brock*, 111 Mass. 219. *Cp. Taylor v. Goding*, 182 Mass. 231.

resume possession of demised premises, amount to a surrender by operation of law.”<sup>1013</sup> Thus, it was held to be a surrender of a lease, that the tenant delivered the key of the premises to the landlord, who received it and put in another tenant.<sup>1014</sup> In another case, the tenant, without notice and without paying rent due, left the premises with the intention of never returning, stopped his business, and never did return, having at the time of his departure locked all the doors except one and left the keys hanging up inside; the lessor having taken possession soon after, kept it for a considerable time; and this was held to amount to a surrender.<sup>1015</sup> But, in the absence of any deed or written instrument the intention of the parties that there shall be a surrender must clearly appear. Therefore, the mere fact that a third person occupies the premises under an agreement with the tenant, and with the knowledge of the landlord, will not raise a presumption of a surrender, especially where the original lease is not cancelled or given up, and the landlord continues to send bills to the original tenant.<sup>1016</sup>

And if a tenant offers to show an agreement on behalf of a proposed corporation to take a new lease the lessor may show that the agreement was conditional on the corporation being formed and that this was never done.<sup>1017</sup>

The taking of a new lease by the same lessee is generally to be regarded as a surrender of a prior lease, but may sometimes be only a confirmation of the prior lease.<sup>1018</sup> Similarly, an agreement by the lessor, that the lessee may assign the

<sup>1013</sup> Bigelow, C. J., in *Talbot v. Whipple*, 14 Allen, 180; *Hanham v. Sherman*, 114 Mass. 19. In the latter case it was held that a judgment for rent obtained by default was not evidence to rebut a surrender thereafter, and only *prima facie* evidence of the absence of a surrender prior to such judgment.

See also *White v. Berry*, 24 R. I. 75; *Grimman v. Legge*, 8 B. & C. 324; *Boyd v. George*, 89 N. W. (Neb.) 271; *Stanley v. Joehler*, 1 Hilton (N. Y.), 354; *Stern v. Thayer*, 56 Minn. 93; *Lynn v. Reed*, 13 M. & W. 285. It is immaterial that the lease is not formally cancelled. *James v. Coles*, 31 Misc. (N. Y.) 653.

<sup>1014</sup> *Randall v. Rich*, 11 Mass. 494. So also in *Weiss v. Levy*, 166 Mass. 290. See *Welcome v. Hess*, 90 Cal. 507.

<sup>1015</sup> *Talbot v. Whipple*, 14 Allen, 177.

<sup>1016</sup> *Brewer v. Dyer*, 7 Cush. 337, 339.

<sup>1017</sup> *Taylor v. Kennedy*, 228 Mass. 390.

<sup>1018</sup> *Flagg v. Dow*, 99 Mass. 18. In this case the prior lease expired before the second was given, but the former lease was held to be in force

premises to a third in the original lease far as the liability concerned.<sup>1019</sup> But another interest is that of the tenant only to his immediate Nor is the mere giving of the instrument a may be sufficient to

The burden of proof

§ 136. Merger.— of the greater and the same right. The undivided fee in a not thereby extinguished conveyed to the lessor of the lease, if proof intervened, *e. g.*, if

§ 137. Destruction of the tenant on the part of the landlord's obligation to repair a casualty by which the tenant becomes excused from his re-

for certain purposes p. 21 of the case.

"Occupation under to the landlord under Mass. 571. Endicott

<sup>1019</sup> Fifty Associates

<sup>1020</sup> 2 Preston, Abst

<sup>1021</sup> Holbrook v. Tarr

4 Kent Com. 104.

<sup>1022</sup> Taylor v. Kenne

<sup>1023</sup> Martin v. Tobin

<sup>1024</sup> Buffum v. Dean

<sup>1025</sup> See Abatement of

<sup>1026</sup> Sewall, J., in For

313. *Cp.* Adams v. N

238 (cases of fire); Wh

So also Mill Dam

wheel); Kramer v. Coc

Where the lease provides "that if the premises shall be destroyed by fire the payment of rent and the relation of landlord and tenant shall cease at the election of either party," a partial injury by fire rendering a part of the building untenable does not authorize the lessee to terminate the lease;<sup>1027</sup> nor does the passage of a city building law between the date of the fire and rebuilding, and requiring new and more expensive materials, give the lessor the right to terminate the lease at his election.<sup>1028</sup> In a clause, that rent shall abate in case of destruction by fire "until the said premises shall have been put in proper condition for use and habitation, and in case of such destruction or damage or a like destruction or damage by any taking or appropriation by public authority for public uses, then the lessor, his heirs or assigns may terminate this lease," "such destruction or damage" means destruction or damage such that the premises "shall be thereby rendered unfit for use and habitation," and not a destruction accompanied by abatement of rent.<sup>1029</sup> Where there has been an abatement by reason of destruction by fire the lessee cannot recover damages for a subsequent eviction.<sup>1030</sup> The term of a lease of a portion of a building being during the "life of the building," if fire destroys the part demised so that the lessee cannot rebuild without also rebuilding other important parts of the building not demised to him, the life of the building is terminated by the fire.<sup>1031</sup>

"The grant of a house, store, mill or other building in general carries with it the land under the building;"<sup>1032</sup> but "a case may be taken out of this general rule if the lease or other grant shows that it was the intention of the parties that the building only or a room in it should pass, and not the land."<sup>1033</sup> The real question is whether the intention of the parties, to be collected from the whole lease, was to grant to the lessees any estate in the land itself.<sup>1034</sup> A provision for abatement of rent if the premises are destroyed or damaged by fire, until the

<sup>1027</sup> Wall v. Hinds, 4 Gray, 256.

<sup>1028</sup> Rogers v. Snow, 118 Mass. 118.

<sup>1029</sup> Hunnewell v. Bangs, 161 Mass. 132.

<sup>1030</sup> *Ibid.*

<sup>1031</sup> Ainsworth v. Mt. Moriah Lodge, 172 Mass. 257.

<sup>1032</sup> See *supra*, § 37.

<sup>1033</sup> Per Morton, J., in Rogers v. Snow, 118 Mass. 118, 124.

<sup>1034</sup> Morton, J., in Shawmut Bank v. Boston, 118 Mass. 125, 129.

## § 138 TENANCY

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§ 138. Eminent  
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<sup>1025</sup> *Rogers v. Se*

<sup>1026</sup> *Stockwell v. I*

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<sup>1027</sup> *Shawmut Ba*

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 G. L., c. 79, §§ 1



cludes every species of valuable vested interest. A tenant for years and his lessor are therefore each entitled to compensation, according to the nature and magnitude of the damages which they may have respectively sustained.<sup>1039</sup> But, where the lessee waits until his remedy has become barred by lapse of time, he cannot recover of the lessor a proportionate part of damages which the latter has recovered acting for himself alone.<sup>1040</sup>

If one of the parties petitions for damages, the other parties in interest may become parties to the proceedings under such petition and the damages of all may be determined together.<sup>1041</sup>

No arrangements or contracts between the owners of different interests in the land can affect the right of the government to take the land for public use, or oblige it to pay by way of compensation more than the entire value of the land as a whole.<sup>1042</sup>

A taking of the entire premises by eminent domain, where the title is divested out of the lessor at once terminates the lease,<sup>1043</sup> but a taking of a part only does not put an end to the lease or deprive the lessee of his term or exempt him from liability to pay the reserved rent.<sup>1044</sup> The land may be taken and not the buildings.<sup>1045</sup>

<sup>1039</sup> See *infra*, § 139, also *Ellis v. Welch*, 6 Mass. 246; *Parks v. Boston*, 15 Pick. 198; *Pegler v. Hyde Park*, 176 Mass. 101; *Stark v. Mansfield*, 178 Mass. 76; *Cornell-Andrews, etc., Co. v. Boston & Providence R. Co.*, 209 Mass. 298; *Brackett v. Com.*, 223 Mass. 119. See *Briggs v. Boston*, 230 Mass. 148.

The same is true of a tenant at will of land on which there is a building of which he is the owner, in case of a change of grade by reason of a grade crossing improvement. *Sheehan v. Fall River*, 187 Mass. 356.

<sup>1040</sup> *Uhland Club v. Schupbach*, 168 Mass. 430.

<sup>1041</sup> G. L., c. 79, §§ 27-30; R. L., c. 48, § 21. In *Brackett v. Com.*, 223 Mass. 119, 129, it was said that separate petitions should be brought by each. This was under a special taking for park purposes.

<sup>1042</sup> *Burt v. Merchants Insurance Co.*, 115 Mass. 1, 15; *Edmands v. Boston*, 108 Mass. 535; *Turner v. Robbins*, 133 Mass. 207; *Anthony v. New York, P. & B. R. R. Co.*, 162 Mass. 60; *Cornell-Andrews, etc., Co. v. Boston & Providence R. R.*, 209 Mass. 298, 305, 307; *Providence, etc., Steamboat Co. v. Fall River*, 187 Mass. 45, 50.

<sup>1043</sup> *O'Brien v. Ball*, 119 Mass. 28; *Devine v. Lord*, 175 Mass. 384, 387; *Boston v. Talbot*, 206 Mass. 82, 92.

<sup>1044</sup> *Parks v. Boston*, 15 Pick. 198; *Patterson v. Boston*, 20 Pick. 159;

<sup>1045</sup> *Emerson v. Somerville*, 166 Mass. 117.

## § 139 TENANCY FOR YEARS UNDER A WRITTEN LEASE

Where there is no evidence of an express taking, the mere fact that a structure is erected in a basement and used by the city as a part of its water system, will not constitute a taking within a clause of the lease providing for abatement of rent in case of action by eminent domain.<sup>1046</sup>

Under this clause: "It is also agreed that, if the lessor shall sell the said house, or if the city shall cut off said premises, the said tenant shall consent thereto, and the said tenant shall do all repairs at his expense," if the city widens a street and cuts off the premises, the lease is determined so that the lessee can have no action against the city.<sup>1047</sup>

In another case, the clause was as follows: "in case the premises, or any part thereof, shall be taken for any street or other public use, or by the action of the city or other authorities, . . . then this lease and the term demised shall terminate at the election of the lessors or those having their estate in the premises." The object of these provisions is that the lessor may be able to terminate the right of the tenant to share in the damages; and, in reality, the election to terminate applies only to the case where a part of the estate is taken,<sup>1048</sup> as the estate of the lessee is terminated in any event by an entire taking.

§ 139. Apportionment of highway damages, etc.<sup>1049</sup>—It is provided by statute that "If a tenant for life or for years and the remainder man or reversioner sustain damages which are recoverable under this chapter, by the taking of their property by eminent domain or injury thereto under authority of law, or if property so taken or injured is encumbered by a contingent remainder, executory devise or power of appointment, entire damages shall be assessed without apportionment thereof, and shall be paid to, or be recoverable by, any person whom the

*Emmes v. Feeley*, 132 Mass. 346; *Devine v. Lord*, 175 Mass. 384, 390; *Goodyear, etc., Co. v. Boston Terminal Co.*, 176 Mass. 115. *Cp.* G. L., c. 186, § 4; R. L., c. 129, § 4; Pub. St., c. 121, § 4, cited *infra*, § 224.

<sup>1046</sup> *Arafe v. Howe*, 228 Mass. 47.

<sup>1047</sup> *Munigle v. Boston*, 3 Allen, 230. See *Hunnewell v. Bangs*, 161 Mass. 132, and *supra*, § 83.

<sup>1048</sup> *Goodyear, etc., Co. v. Boston Terminal Co.*, 176 Mass. 115. *Cp.* *Boston v. Talbot*, 206 Mass. 82, 93.

<sup>1049</sup> For general review of legislation on this subject, see *Cornell-Andrews, etc., Co. v. Boston & Providence R. Co.*, 209 Mass. 298; *Boston v. Robbins*, 121 Mass. 453.

parties may appoint, and be held in trust by him for their benefit according to their respective interests. The trustee shall, from the income thereof, pay to the reversioner or remainder man the value of any annual rent or other payment which would, but for such damages, have been payable by the tenant, and the balance thereof to such tenant during the period for which his estate was limited, and upon its termination, he shall pay the principal to the reversioner or remainder man." <sup>1050</sup>

"The amount so to be placed in trust shall include only the damages assessed to the whole property; and damage special to a separate estate therein, and all interest or other earnings which accrue between the taking and the receipt by the trustee of the damages to the whole property, shall be awarded in the same proceedings separately." <sup>1051</sup> These provisions are constitutional as to their effect upon leases made after their passage, as parties must be taken to have contracted with reference to them. <sup>1052</sup>

These provisions are intended to apply only when the various parties in interest hold estates in the entire premises successive in respect to time; thus, in case of a lease for years of the entire estate, where land was subsequently taken for a

<sup>1050</sup> G. L., c. 79, § 24; R. L., c. 48, § 17; St. 1883, c. 253; Pub. St., c. 49, § 18; Gen. St., c. 43, § 17; St. 1851, c. 290, § 1.

Cited in *Boston v. Robbins*, 121 Mass. 455; *s. c.*, 126 Mass. 384; *Turner v. Robbins*, 133 Mass. 207; *Edmands v. Boston*, 108 Mass. 535; *Uhland Club v. Schupbach*, 168 Mass. 430; *Davenport v. Dedham*, 178 Mass. 384; *Stark v. Mansfield*, 178 Mass. 82; *Emery v. Boston Terminal Co.*, 178 Mass. 185; *Galeano v. Boston*, 195 Mass. 65; *Cornell-Andrews, etc., Co. v. Boston & Providence R. R.*, 209 Mass. 298, 308; *Cornell-Andrews, etc., Co. v. Boston & Providence R. R.*, 215 Mass. 388; *Mills v. Samuels*, 230 Mass. 1. *Cp.* St. 1874, c. 388, providing that in cases under St. 1851, c. 290 any special and peculiar damages suffered by a tenant should be assessed separately and paid to the tenant and not to the trustee. *Cornell-Andrews, etc., Co. v. Boston & Providence R. Co.*, 209 Mass. 298, 306; *Galeano v. Boston*, 195 Mass. 65.

As to summoning in the lessor to intervene in a petition by the lessee, see *Cornell-Andrews, etc., Co. v. Boston & Providence R. Co.*, 209 Mass. 298, 309.

For provisions as to the choice of trustee, see G. L., c. 79, § 26. As to the form of a verdict, see G. L., c. 79, § 29.

<sup>1051</sup> G. L., c. 79, § 25; R. L., c. 48, § 18.

<sup>1052</sup> *Turner v. Robbins*, 133 Mass. 207.

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If the lessor has settled for his damages, this does not deprive the lessee of his right to independent compensation.<sup>1058</sup> Any special damage to the lessee or any damage different from that to the lessor is to be found separately and added to the general damage.<sup>1059</sup>

The existence of a sublease of a part of the term, and of a mortgage by the lessee of his interest, does not oblige the lessor to apply for an apportionment of the damages.<sup>1060</sup> So, also, the act does not extend to tenants at will; and, in an action for damages by a tenant at will, the defendant though a stranger may rely upon the statute without pleading it, as it is part of the plaintiff's case.<sup>1061</sup>

The same provisions apply to town ways and private ways,<sup>1062</sup> to footways,<sup>1063</sup> land taken for earth and gravel pits,<sup>1064</sup> and to the taking of "any water, land, rights of way, water rights or easements," and to "the erection of a dam or the construction of an aqueduct, reservoir, waterway, or of any other works for the purpose of supplying water to a city or town."<sup>1065</sup> So also in the case of land taken for railroads;<sup>1066</sup> to abolish grade crossings;<sup>1067</sup> and for many other public uses in which the procedure is assimilated to that in the case of highways. Sheriffs, constables or police officers may also, under a warrant issued by a magistrate authorized to issue warrants, and under the direction of a board of health, take convenient houses for the accommodation of the sick.<sup>1068</sup>

<sup>1058</sup> *Cornell-Andrews, etc., Co. v. Boston & Providence R. Co.*, 202 Mass. 585, 598.

<sup>1059</sup> *Cornell-Andrews, etc., Co. v. Boston & Providence R. Co.*, 209 Mass. 298, 314.

<sup>1060</sup> *Stark v. Mansfield*, 178 Mass. 76.

<sup>1061</sup> *Emery v. Boston Terminal Co.*, 178 Mass. 172, 182. See *Cornell-Andrews, etc., Co. v. Boston & Providence R. Co.*, 209 Mass. 298, 305.

<sup>1062</sup> G. L., c. 79, § 1; R. L., c. 48, § 70.

<sup>1063</sup> G. L., c. 82, § 33; R. L., c. 48, § 84.

<sup>1064</sup> G. L., c. 82, § 38; R. L., c. 48, § 105.

<sup>1065</sup> G. L., c. 79, § 23; R. L., c. 48, § 107.

<sup>1066</sup> G. L., c. 160, § 101; St. 1906, c. 463, § 95. See *Norwich & Worcester R. R. Co. v. Worcester*, 147 Mass. 518.

<sup>1067</sup> *Providence, etc., Steamboat Co. v. Fall River*, 187 Mass. 45, 50; *Cornell-Andrews, etc., Co. v. Boston & Providence R. Co.*, 202 Mass. 585, 598.

<sup>1068</sup> G. L., c. 111, § 96; St. 1906, c. 365, § 2; St. 1902, c. 204, § 2. *Hersey v. Chapin*, 162 Mass. 176; *Sallinger v. Smith*, 192 Mass. 317.



property and of the amount of his business is competent only on the capacity of the real estate for use.<sup>1077</sup>

Where the lease expires shortly after the taking, the tenant is not entitled to damages for being forced to move, nor to the expenses of moving.<sup>1078</sup> Nor is the fact that the lessor and lessee intended to continue their relations indefinitely, competent to increase the value of the lease.<sup>1079</sup> Nor can the value of a lessee's option to purchase be considered.<sup>1080</sup> But the tenant is entitled to damages for impairment in the use of a building owned by him by reason of impaired access, even though the approach is not entirely cut off.<sup>1081</sup>

As regards the damages of the general owner, the surrender of a lease before the assessment of damages may be shown in evidence;<sup>1082</sup> but, where the general owner has been paid, a cancellation of the lease is not to be considered in estimating the damages of the lessee.<sup>1083</sup>

Interest upon the damages is ordinarily allowed from the time when they were payable, which is ordinarily the time of the taking;<sup>1084</sup> but, under the statute,<sup>1085</sup> persons entitled to damages cannot demand them until possession is taken for the purpose of construction, and interest does not begin to run until that time.<sup>1086</sup>

was for injury from the construction of a drawless bridge below the petitioner's wharf it was said that evidence of a lessee's profits was not admissible on the question of the value of his leasehold.

<sup>1077</sup> Pegler v. Hyde Park, 176 Mass. 101.

<sup>1078</sup> Emery v. Boston Terminal Co., 178 Mass. 172, 186.

<sup>1079</sup> *Ibid.*

<sup>1080</sup> Cornell-Andrews, etc., Co. v. Boston & Providence R. Co., 202 Mass. 585, 599; s. c., 209 Mass. 298; Pegler v. Hyde Park, 176 Mass. 101. It seems that the lessee is not without remedy as he can pursue the fund in equity. Cornell-Andrews, etc., Co. v. Boston & Providence R. Co., 209 Mass. 298.

<sup>1081</sup> Sheehan v. Fall River, 187 Mass. 356.

<sup>1082</sup> Dickenson v. Fitchburg, 13 Gray, 546, 558.

<sup>1083</sup> Pegler v. Hyde Park, 176 Mass. 101.

<sup>1084</sup> Parks v. Boston, 15 Pick. 198, 208; Pegler v. Hyde Park, 176 Mass. 101. So with takings by the Met. Park Commission. Hay v. Com., 183 Mass. 294.

<sup>1085</sup> G. L., c. 79, § 6; R. L., c. 48, § 13; Pub. St., c. 49, § 14. See St. 1904, c. 317.

<sup>1086</sup> Edmands v. Boston, 108 Mass. 535, 551; Pegler v. Hyde Park, 176 Mass. 101, 104; Cornell-Andrews, etc., Co. v. Boston & Providence R.

## § 141 TENANCY FOR YEARS UNDER A WRITTEN LEASE

§ 141. **Eviction.—Definition.**—An eviction is where the tenant is intentionally deprived of his possession of lands or tenements either by the landlord or by a paramount title.

An eviction caused by a taking by eminent domain does not therefore come within this definition. The lessee's occupation is always subject to the exercise of the right of eminent domain.<sup>1087</sup>

"A definition of eviction has been sometimes given by which, to constitute an eviction of a tenant by a landlord, there must be an amotion of the tenant from the demised premises by, or in consequence of, some act of the landlord in derogation of the rights of the tenant, and with the intent to determine the tenancy, or to deprive the tenant of the enjoyment of the premises, or some part thereof. The amotion may be by physical expulsion by the landlord, or by abandonment by the tenant upon some act of the landlord which amounts to an eviction at the election of the tenant. The intent with which the act is done may be an actual intent accompanying and characterizing the act, or it may be inferred from the act itself. From a tortious entry by the landlord upon the premises, no presumption of an intent to evict the tenant arises, and such entry is not of itself an eviction at the election of the tenant; but, if accompanied by a claim of title, there is such a presumption, and the act is such an eviction. . . . From the physical exclusion of the tenant from the premises, the law presumes an intent to evict; and wrongful acts of the landlord upon the premises which render them permanently unsafe and unfit for occupancy, so that the tenant loses the enjoyment of them, carry with them the presumption of the intent to deprive the tenant of that enjoyment."<sup>1088</sup>

Co., 202 Mass. 585, 601. Cf. *Everett v. Fall River*, 189 Mass. 513, 517.

<sup>1087</sup> See *supra*, § 79. *Cornell-Andrews, etc., Co. v. Boston & Providence R. Co.*, 202 Mass. 585, 597; s. c., 209 Mass. 298; *Weeks v. Grace*, 194 Mass. 296, 298.

<sup>1088</sup> W. Allen, J., in *Skally v. Shute*, 132 Mass. 367. See also Gray, J., in *Royce v. Guggenheim*, 106 Mass. 201, 203; *Roth v. Adams*, 185 Mass. 341; *Taylor v. Finnigan*, 189 Mass. 568; *Voss v. Sylvester*, 203 Mass. 233, 240; *Nesson v. Adams*, 212 Mass. 429 (question for jury whether irregular elevator service, unlighted stairs and garbage left about by janitor constituted an eviction); *Lumiansky v. Tessier*, 213 Mass. 182; *Smith v. Tennyson*, 219 Mass. 508, 511; *Boston Veterinary Hospital v. Kiley*, 219



In another case it was said: "To constitute an eviction . . . there must either be an actual expulsion of the tenant, or some act of a permanent character, done by the landlord with the intention and effect of depriving the tenant of the enjoyment of the demised premises or some part of them, to which he yields, abandoning the possession within a reasonable time." <sup>1089</sup>

"Where a landlord has refused to give his consent to an act by a tenant or a third person without which the tenant cannot occupy the premises, there is a constructive eviction." <sup>1090</sup>

In other words, the intention to evict is a necessary element in an eviction; and, where the wrongful acts of the disturbing party operate to deprive the lessee of the enjoyment of the premises, the intent to evict is presumed conclusively as a matter of law. It may, however, happen that the acts which it is claimed constitute an eviction are in themselves ambiguous, and the question of intent is then a question of fact for the jury.<sup>1091</sup> Thus, where the landlord took the tenant's keys for certain purposes, it was held to be a question for the jury upon the whole evidence, whether there was a real and substantial exclusion of the tenant from the rooms, or merely a temporary holding of the keys incident to the care of the rooms.<sup>1092</sup> And where the lessor violently expelled the lessee from the premises to prevent his talking with a building inspector, it may be found there was no intent to interfere with his possession.<sup>1093</sup>

"But the question of actual intent arises only when the acts are such as do not of themselves afford a presumption of intent." <sup>1094</sup> Whether an intent to evict can be presumed from the neglects of the landlord's agent, *quære*.<sup>1095</sup> The good faith of the landlord, or the fact that both parties acted under a

Mass. 533, 537; *Wesson v. Adams*, 212 Mass. 429; *Aguglian v. Cavichia*, 229 Mass. 263.

<sup>1089</sup> *Bartlett v. Farrington*, 120 Mass. 284, per Morton, J.

<sup>1090</sup> *Smith v. Tennyson*, 219 Mass. 508, 511, per Loring, J., citing *Royce v. Guggenheim*, 106 Mass. 201; *Skally v. Shute*, 132 Mass. 367; *McCall v. New York Life Ins. Co.*, 201 Mass. 223; *Nesson v. Adams*, 212 Mass. 429.

<sup>1091</sup> *Upton v. Townend*, 17 C. B. 30; *Faxon v. Jones*, 176 Mass. 138, 140.

<sup>1092</sup> *Faxon v. Jones*, 176 Mass. 138. See *Taylor v. Kennedy*, 228 Mass. 390, 393.

<sup>1093</sup> *Lumiansky v. Tessier*, 213 Mass. 182.

<sup>1094</sup> *Skally v. Shute*, 132 Mass. 367, per W. Allen, J.

<sup>1095</sup> *DeWitt v. Pierson*, 112 Mass. 8.

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mistake of fact, may have some bearing on the tortiousness of the act, but apparently cannot overcome the presumption of intent.<sup>1096</sup> If he retains possession, he elects not to treat the acts complained of as an eviction;<sup>1097</sup> but an offer of proof that the tenant never entered the leased premises and was unable to do so after the acts complained of, leaves no question for the jury.<sup>1098</sup> No action of the landlord, however, can be an eviction unless in fact the tenant abandons possession of the premises as a result.<sup>1099</sup> A lessor leased a whole building subject to unexpired leases of a portion to the plaintiffs. The new lessee proceeded to erect an electric light plant which seriously interfered with the plaintiffs' light and their ability to get insurance. These facts were held to warrant a finding of an interruption of the plaintiffs' right to quiet enjoyment; but whether it amounted to an eviction, *quære*.<sup>1100</sup> Where a lessee mortgaged his goods as security for the rent, and the mortgage provided that on default the lessor might take possession of the goods, and, after notice, sell at public auction; and, on default, the lessor entered, sold the goods in the regular course of business and collected rent from subtenants, this amounts to an ouster.<sup>1101</sup> Yielding possession to prevent being actually expelled is equivalent to an ouster.<sup>1102</sup> Defective

<sup>1096</sup> See *Mirick v. Hoppin*, 118 Mass. 582.

<sup>1097</sup> *Callahan v. Goldman*, 216 Mass. 238.

<sup>1098</sup> *Smith v. Tennyson*, 219 Mass. 508, 511.

<sup>1099</sup> *DeWitt v. Pierson*, 112 Mass. 8; *Bartlett v. Farrington*, 120 Mass. 284; *International Trust Co. v. Schumann*, 158 Mass. 287; *Riley v. Lally*, 172 Mass. 244; *Roth v. Adams*, 185 Mass. 341, 344, *Voss v. Sylvester*, 203 Mass. 233, 240; *Callahan v. Goldman*, 216 Mass. 238. See *Boston & Worcester R. R. Co. v. Ripley*, 13 Allen, 421.

<sup>1100</sup> *Case v. Minot*, 158 Mass. 577. *Cp.* *Voss v. Sylvester*, 203 Mass. 233, 238, where the use of a platform outside a shop rendered the shop less useful.

<sup>1101</sup> *Hall v. Middleby*, 197 Mass. 485.

<sup>1102</sup> *Skally v. Shute*, 132 Mass. 367; *Morse v. Goddard*, 13 Met. 177; *Holbrook v. Young*, 108 Mass. 83; *George v. Putney*, 4 Cush. 351.

See *Bartlett v. Farrington*, 120 Mass. 284; *Royce v. Guggenheim*, 106 Mass. 201; *Mirick v. Hoppin*, 118 Mass. 582; *Hamilton v. Cutts*, 4 Mass. 349; *Gore v. Brazier*, 3 Mass. 523, 540; *Smith v. Shepard*, 15 Pick. 147.

If the report of a case to the Supreme Judicial Court, in a matter of the eviction of a tenant by a title paramount to that of the lessor, makes no question of such title, the want of proof of such title cannot be objected to in that court. *Holbrook v. Young*, 108 Mass. 83.

elevator service caused by abstraction of power for other purposes by the lessor, continued after complaints, and rendering the premises unsuitable for the purpose for which they were hired, constitutes an eviction.<sup>1103</sup>

So it is an eviction if the landlord takes one of the tenant's keys from his door without his knowledge, and refuses to allow him to have a new key made, although there is a rule of the building that a key might only be made with the consent of the lessor, and thereafter the tenant is unable to enter the room.<sup>1104</sup>

So is the turning off of water by the lessor from the lessee's stable while repairs were being made and not permitting him to get water for his horses from another part of the building.<sup>1105</sup>

The mere fact that rooms beneath a tenant are occupied for noisy, disorderly and immoral purposes does not constitute an eviction, although the tenant notifies the landlord who fails to remedy the evils complained of;<sup>1106</sup> nor will the tenant be entitled for these reasons to any diminution of the rent. So, where the use by other tenants of a platform caused a leak into a tenant's shop, but it appeared he knew of such use when he took his lease and made no objection to it, and the lessor made no promise to alter the use.<sup>1107</sup> Nor, where the landlord is expressly not obliged to repair, is his failure to obey an order of the county commissioners to repair mill gates whereby the gates are removed and the lessee deprived of water power, an eviction.<sup>1108</sup> So, where the landlord, at the request of a sublessee, rents him an additional part of a building and moves a partition so as to include the new part, the lessee continuing to pay rent for the old part, and the sublessee for the new, such alteration is not an eviction.<sup>1109</sup>

<sup>1103</sup> *McCall v. New York Life Ins. Co.*, 201 Mass. 223. *Cp. Nesson v. Adams*, 212 Mass. 429.

<sup>1104</sup> *Smith v. Tennyson*, 219 Mass. 508.

<sup>1105</sup> *Boston Veterinary Hospital v. Kiley*, 219 Mass. 533.

<sup>1106</sup> *DeWitt v. Pierson*, 112 Mass. 8. *Cp. Illegal Use, supra*, §§ 128-132.

<sup>1107</sup> *Voss v. Sylvester*, 203 Mass. 233, 240.

<sup>1108</sup> *Pratt & Grafton Electric Co.*, 182 Mass. 180. *Cp. Roth v. Adams*, 185 Mass. 341; *Gaston v. Gordon*, 208 Mass. 265; *Lumiansky v. Tessier*, 213 Mass. 182 (theatre license to lessor as owner revoked because of failure of lessee to make alterations).

<sup>1109</sup> *Appleton v. O'Donnell*, 173 Mass. 398.

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A formal entry by the landlord upon the premises, under claim of right to repossess them for breach of covenants by the tenant, does not amount to an eviction, unless the tenant yields and quits possession;<sup>1110</sup> nor do frequent entries upon the premises, the carrying away of flowers and crops, or cutting down a fruit tree,<sup>1111</sup> nor does the mere removal of furniture left by a previous tenant by the landlord or one acting under him.<sup>1112</sup> Nor is the bringing of a process to eject the tenant an eviction, though final judgment therein be rendered for the tenant.<sup>1113</sup> Such entry and suit, if the tenant yields to them, may be a breach of covenant, but otherwise are at most a mere trespass, for which the tenant can only recover damages in an action of tort.<sup>1114</sup> Nor is the action of the landlord in causing the tenant's license as a common victualler to be taken from him and in inducing the license commissioners to refuse him a license for the sale of liquors, although the landlord knew that the premises were of value to the tenant only for his business of a common victualler.<sup>1115</sup>

Nor is the fact that, without the landlord's fault, the lessee is unable to use the premises for the purpose for which he hired them.<sup>1116</sup>

Nor is it an eviction where the lessor notifies subtenants not to pay rent to the lessee, or collects rent from such tenants receipting in his own name, in consequence of which the lessee vacates.<sup>1117</sup> Nor is it an eviction where, two years after the creation of a tenancy, a dwelling apartment is found infested with cockroaches, and the landlord made an unsuccessful attempt to exterminate them.<sup>1118</sup>

Where the lease contains a provision for abatement of rent in case of destruction of the premises by fire, if the premises

<sup>1110</sup> *Sherman v. Williams*, 113 Mass. 481.

<sup>1111</sup> *Brown v. Holyoke Water Power Co.*, 152 Mass. 463.

<sup>1112</sup> *Smith v. McEnany*, 170 Mass. 26.

<sup>1113</sup> *Townsend v. Nickerson Wharf Co.*, 117 Mass. 501. *Cp. Shumway v. Collins*, 6 Gray, 227.

<sup>1114</sup> *Boston & Worcester R. R. Co. v. Ripley*, 13 Allen, 421.

<sup>1115</sup> *International Trust Co. v. Schumann*, 158 Mass. 287; *Taylor v. Finnigan*, 189 Mass. 586.

<sup>1116</sup> *Gaston v. Gordon*, 208 Mass. 265 (lessee unable to get liquor license); *Barnett v. Clark*, 225 Mass. 185 (garage law changed during term so as to require extensive alterations).

<sup>1117</sup> *Aguglia v. Cavicchia*, 229 Mass. 263.

<sup>1118</sup> *Hopkins v. Murphy*, 233 Mass. 476.

are rendered unfit for use or habitation by fire this fact is a defence to an action for a subsequent eviction.<sup>1119</sup>

If the tenant relies upon the defence that other tenants have been accepted from whom rent has been collected, the lessor may show that his acts when explained raise no presumption of an intention to evict, and that in fact the tenant had never been ousted.<sup>1120</sup> Where a lessee's estate is determined through his failure to perform his covenants, his sublessee is not obliged to wait for a technical eviction by the lessor, but may attorn and look to the sublessor for damages.<sup>1121</sup>

The definition of and principles governing eviction are the same whether it is the basis of an action of tort, or of an action for breach of the covenant for quiet enjoyment, or whether it is used as a defence in an action for rent.<sup>1122</sup>

A declaration of an agent of a lessee, not made in the presence of the lessor, that he had nothing to do with the premises, is inadmissible, being a self-serving statement.<sup>1123</sup>

§ 142. **Effect of eviction.**—An eviction operates to discharge the lessee from liability to pay rent due after the eviction takes place;<sup>1124</sup> but *aliter* of a mere interruption of the occupation not amounting to an eviction.<sup>1125</sup> If the rent is payable in advance, it may be paid at any time during the day on which it is made payable; and, if the lessee is evicted on such a day under a paramount title, he is discharged from his obligation to pay such rent.<sup>1126</sup> Where the parties have agreed that the value of repairs made by the tenant may be deducted from the rent, an eviction by the landlord does not

<sup>1119</sup> *Hunnewell v. Bangs*, 161 Mass. 132.

<sup>1120</sup> *Taylor v. Kennedy*, 228 Mass. 390, 393.

<sup>1121</sup> *Casassa v. Smith*, 206 Mass. 69.

<sup>1122</sup> *Callahan v. Goldman*, 216 Mass. 238.

<sup>1123</sup> *Taylor v. Kennedy*, 228 Mass. 390, 339.

<sup>1124</sup> *Colburn v. Morrill*, 117 Mass. 262; *Holbrook v. Young*, 108 Mass. 83, 85; *Fitchburg Cotton Mfg. Co. v. Melven*, 15 Mass. 268; *Smith v. Shepard*, 15 Pick. 147, 149; *Shumway v. Collins*, 6 Gray, 227; *Royce v. Guggenheim*, 106 Mass. 201; *Morse v. Goddard*, 13 Met. 177; *Smith v. McEnany*, 170 Mass. 26; *Leishman v. White*, 1 Allen, 489; *Bordman v. Osborn*, 23 Pick. 295, 299; *Hall v. Middleby*, 197 Mass. 485; *McCall v. New York Life Ins. Co.*, 201 Mass. 223.

<sup>1125</sup> *Fuller v. Ruby*, 10 Gray, 285.

<sup>1126</sup> *Smith v. Shepard*, 15 Pick. 147. *Cp.*, as to forfeiture for non-payment of rent, *supra*, § 122; and as to apportionment of rent, *infra*, § 225.

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alter this agreement.<sup>1127</sup> So, after an eviction, the tenant is not liable for use and occupation, because an unlawful eviction does not terminate the lease where the lessee still occupies a part of the estate from which he has not been actually evicted;<sup>1128</sup> but, as the lease is not terminated, the tenant may be liable on the other covenants under it, such as to repair.<sup>1129</sup> And he is liable for all rent which has become due before the eviction.<sup>1130</sup>

An eviction is likewise a defence to an action upon a covenant to pay taxes in monthly instalments.<sup>1131</sup>

Where a tenant has been evicted, he is not obliged to return, even if the cause of the eviction be removed; and no right to rent exists except upon a voluntary return of the tenant.<sup>1132</sup>

§ 143. Eviction from part of premises.—An eviction by the landlord from a material portion of the premises entitles the tenant to treat it as an eviction from the whole;<sup>1133</sup> and, as

<sup>1127</sup> Fillebrown v. Hoar, 124 Mass. 580.

<sup>1128</sup> Leishman v. White, 1 Allen, 489, overruling the dictum to the contrary and in favor of early English cases in Fitchburg Cotton Mfg. Co. v. Melven, 15 Mass. 267; Royce v. Guggenheim, 106 Mass. 201; Colburn v. Morrill, 117 Mass. 262; Smith v. McEnany, 170 Mass. 26. See also Shumway v. Collins, 6 Gray, 227; Fuller v. Ruby, 10 Gray, 285, where, however, the point was not decided.

<sup>1129</sup> Smith v. McEnany, 170 Mass. 26.

<sup>1130</sup> Fitchburg Cotton Mfg. Co. v. Melven, 15 Mass. 268.

<sup>1131</sup> Hall v. Middleby, 197 Mass. 485, 490.

<sup>1132</sup> McCall v. New York Life Ins. Co., 201 Mass. 223.

<sup>1133</sup> Royce v. Guggenheim, 106 Mass. 201; Leishman v. White, 1 Allen, 489; Sherman v. Williams, 43 Mass. 481; Brown v. Holyoke Water Power Co., 152 Mass. 463; Smith v. McEnany, 170 Mass. 26; Bordman v. Osborn, 23 Pick. 295, 299; Colburn v. Morrill, 117 Mass. 262, 264; Fillebrown v. Hoar, 124 Mass. 580, 583; Moore v. Mansfield, 182 Mass. 302.

In Smith v. McEnany, 170 Mass. 26, Holmes, J., said: "The main reason which is given for the decisions is that the enjoyment of the whole consideration is the foundation of the debt and the condition of the covenant, and the obligation to pay cannot be apportioned. Shumway v. Collins, 6 Gray, 227, 232; Leishman v. White, 1 Allen, 489; Royce v. Guggenheim, 106 Mass. 201, 202. . . . It is also said that the landlord shall not apportion his own wrong, following an expression in some of the older English books. Royce v. Guggenheim, *ubi supra*; Colburn v. Morrill, 117 Mass. 262; Mirick v. Hoppin, 118 Mass. 582, 587. But this does not so much explain the rule as suggest the limitation that there may be an apportionment when the eviction is by title paramount, or when the lessor's entry is rightful. Fillebrown v. Hoar, 124 Mass. 580. . . . Gilbert,

we have seen, he is neither bound to remain in occupation of the residue of the estate nor liable for rent if he chooses to remain. If he remains, he is in under the lease, and therefore is not liable for use and occupation as a tenant at will.<sup>1124</sup> But if there is an eviction by a title paramount from a part of the premises, the rent is apportionable and the eviction a bar *pro tanto* only.<sup>1125</sup>

Thus, where the landlord erected, upon land included in the demise, a building which rendered unfit for use two rooms which the tenant had been using as kitchen and bedroom, it was held the tenant might elect to treat it as an eviction, give up the premises and refuse to pay rent.<sup>1126</sup> So, it was held that the jury could find a partial eviction, where the landlord locked one room out of three leased by the tenant and a fourth which the tenant claimed was included in the lease, said he should not allow a certain person to enter the building, forbade the tenant's wife to enter the locked rooms, and carried away the keys.<sup>1127</sup> So, where the landlord retained the key of a room and never gave it to the tenant although the latter

Rents, 151 *et seq.* It leaves open the question why the landlord may not show that his wrong extended only to a part of the premises. No doubt the question equally may be asked why the lease is construed to exclude apportionment, and it may be that this is partly due to the traditional doctrine that the rent issues out of the land, and that the whole rent is charged on every part of the land. Gilbert, Rents, 178, 179, gives this as one ground why the lessor shall not discharge any part from the burden and continue to charge the rest, coupled with considerations partly of a feudal nature. . . . But the same view naturally would be taken if the question arose now for the first time. The land is hired as one whole. If by his own fault the landlord withdraws a part of it, he cannot recover either on the lease or outside of it for the occupation of the residue. *Leishman v. White*, 1 Allen, 489. See *Fuller v. Ruby*, 10 Gray, 285, 289; *Keener, Quasi Contracts*, 215. . . . Outside the rule *de minimis*, the degree of interference with the use and enjoyment of the premises is important only in the case of acts not physically excluding the tenant, but alleged to have an equally serious practical effect, just as the intent is important only in the case of acts not necessarily amounting to an entry and deforcement of the tenant. *Skally v. Shute*, 132 Mass. 367."

<sup>1124</sup> *Shumway v. Collins*, 6 Gray, 227, 232.

<sup>1125</sup> *Fillebrown v. Hoar*, 124 Mass. 580.

<sup>1126</sup> *Royce v. Guggenheim*, 106 Mass. 201.

<sup>1127</sup> *Colburn v. Morrill*, 117 Mass. 262. *Cp. Faxon v. Jones*, 176 Mass. 138.



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asked for it.<sup>1138</sup> So, where a landlord has erected a building under the eaves of the demised premises.<sup>1139</sup> So, where rooms are let with power in one contract, a disconnecting of the power amounts to an eviction from the whole premises.<sup>1140</sup> So, where a permanent brick wall was built encroaching a foot or two on the demised premises, which materially changed the enjoyment of the premises.<sup>1141</sup> So, if a landlord who has leased premises for an ice business, with a right to cut ice, interfere with the cutting of ice.<sup>1142</sup>

If the landlord is unable to turn over to the lessee at the beginning of the lease the whole of the premises contracted for, this constitutes a partial eviction.<sup>1143</sup>

The erection by the landlord in front of the premises of a fence, in such a manner that the tenant's only mode of access is by going over land of a third person is not necessarily an eviction, if the tenant still uses the premises;<sup>1144</sup> but such use would be less valuable by reason of such erection.<sup>1145</sup> So, there is no eviction if the landlord encloses a portion of the demised premises with the knowledge of the tenant, both parties at the time supposing that the line of the land thus enclosed was the true line of the demised premises.<sup>1146</sup>

So, where the lessor substitutes a new entrance for the one existing where a lease is made, the new one being through the building of another, and the lessee of that other subsequently closes the entrance, leaving the complaining tenant only an entrance on another street.<sup>1147</sup>

Where there has been a partial eviction, the tenant instead of treating it as an eviction from the whole premises, may retain possession of that portion from which he has not been

<sup>1138</sup> *Moore v. Mansfield*, 182 Mass. 302.

<sup>1139</sup> *Sherman v. Williams*, 113 Mass. 481.

<sup>1140</sup> *Brown v. Holyoke Water Power Co.*, 152 Mass. 463.

<sup>1141</sup> *Smith v. McEnany*, 170 Mass. 26.

<sup>1142</sup> *Walker Ice Co. v. American Steel & Wire Co.*, 185 Mass. 463, 467 (semble).

<sup>1143</sup> *Townsend v. Nickerson Wharf Co.*, 117 Mass. 501. *Cp. Shumway v. Collins*, 6 Gray, 227; *Moore v. Mansfield*, 182 Mass. 302.

<sup>1144</sup> *Boston & Worcester R. R. Co. v. Ripley*, 13 Allen, 421.

<sup>1145</sup> *Ibid.*

<sup>1146</sup> *Mirick v. Hoppin*, 118 Mass. 582. In this case, the landlord on discovering his mistake offered to remove the fence, but the tenant forbade his doing so.

<sup>1147</sup> *Epstein v. Dunbar*, 221 Mass. 579.



evicted, and sue for the breach of the covenant for quiet enjoyment.<sup>1148</sup>

§ 144. **Remedy and damages for eviction.**<sup>1149</sup>—The usual remedy for an eviction is an action of tort.<sup>1150</sup> In this action, the question whether there has been a real and substantial exclusion is for the jury.<sup>1151</sup> A tenant illegally evicted may recover for injury to his feelings,<sup>1152</sup> but not for injury to his health resulting from moving, or from attending his family when ill from the effects of the eviction, or from grief at their illness.<sup>1153</sup>

In a case where a retail fruit dealer had been evicted, the court said: "The plaintiff's damages were not necessarily limited to the value of his leasehold interest. . . . He was entitled to such damages as directly resulted from the wrong done him. He could show the nature and extent of his business and the extent to which it had necessarily been interrupted and the expense which he had been obliged to incur to reestablish his business in another shop; but he ought not to have been allowed to testify to the amount of his weekly profits for the time immediately preceding his eviction. Those profits may have been unusually large, or may have been affected by unusual circumstances."<sup>1154</sup>

It seems, however, that evidence of experts in the tenant's line of business should not be admissible to show what profits might have been.<sup>1155</sup>

In estimating the value of an unexpired term, the question whether the lease is by its terms assignable is a material element.<sup>1156</sup>

<sup>1148</sup> *Sherman v. Williams*, 113 Mass. 481; *Townsend v. Nickerson Wharf Co.*, 117 Mass. 501. *Cp.* *Epstein v. Dunbar*, 221 Mass. 579.

<sup>1149</sup> See also *Covenant for Quiet Enjoyment*, *supra*, § 80.

<sup>1150</sup> *Faxon v. Jones*, 176 Mass. 138; *Kostopolos v. Pezzetti*, 207 Mass. 277.

<sup>1151</sup> *Ibid.*

<sup>1152</sup> *Fillebrown v. Hoar*, 124 Mass. 580. But on this issue evidence of the illness of his family subsequent to the eviction is inadmissible. *Ibid.*

<sup>1153</sup> *Fillebrown v. Hoar*, 124 Mass. 580.

<sup>1154</sup> *Kostopolos v. Pezzetti*, 207 Mass. 277, 280, per Sheldon, J. See *Nelson Theatre Co. v. Nelson*, 216 Mass. 30, where profits for the period immediately preceding the eviction were held competent. See also *Gagnon v. Sperry & Hutchinson Co.*, 206 Mass. 547.

<sup>1155</sup> *Nelson Theatre Co. v. Nelson*, 216 Mass. 30.

<sup>1156</sup> *Rice v. Baker*, 2 Allen, 411.

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Where a lessor has the privilege of paying a certain sum and terminating the lease, the remedy of the lessee is for the eviction and not to recover the stipulated sum.<sup>1157</sup>

**Equity.**—A lessee whose lease has still three years to run, and who is threatened with complete eviction, is entitled to an injunction, and is not forced to be content with damages; on the ground that the injury to the defendant is incommensurate with the gain to the plaintiff.<sup>1158</sup>

In a case of partial eviction, the lease is not thereby necessarily determined, and it is not essential that the tenant should abandon the entire premises before seeking relief in equity.<sup>1159</sup>

Where it has become impossible for the lessor to restore premises in the respect which constitutes the eviction, equity will retain the case for the awarding of damages.<sup>1160</sup>

**Recovery of consideration.**—Where a lessee delivered certain stock to the lessor in consideration of which he obtained a lease of premises at a reduced rent, and was afterward legally evicted by the lessor, it was held that he could not recover the value of the stock in an action of contract.<sup>1161</sup>

**Recoupment.**—Damages for an eviction may be recouped in an action for rent.<sup>1162</sup>

§ 145. **Statutory notice to quit.**—The General Laws provide that “Upon the neglect or refusal to pay the rent due under a written lease, fourteen days’ notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease, unless the tenant four days at least before the return day of the writ, in an action brought by the landlord to recover possession of the premises, pays or tenders to the landlord or to his attorney all rent then due, with interest and costs of suit.”<sup>1163</sup>

<sup>1157</sup> *Harrison v. Jordan*, 194 Mass. 496.

<sup>1158</sup> *Lynch v. Union Institution for Savings*, 158 Mass. 394. Holmes, J., said: “The result of denying the injunction is to ‘allow the wrongdoer to compel innocent persons to sell their right at a valuation.’” *Tucker v. Howard*, 128 Mass. 361, 363.” The court also held that if the defendant had been at some expense already on the plaintiff’s premises it was immaterial. See, also, *Wenz v. Pastene*, 209 Mass. 359.

<sup>1159</sup> *Epstein v. Dunbar*, 221 Mass. 579.

<sup>1160</sup> *Ibid.*

<sup>1161</sup> *Dearborn v. Valpey*, 153 Mass. 20.

<sup>1162</sup> *Holbrook v. Young*, 108 Mass. 83, 85.

<sup>1163</sup> G. L., c. 186, § 11; R. L., c. 129, § 11; Pub. St., c. 121, § 11; Gen. St., c. 90, § 30, c. 137, § 3; St. 1847, c. 267. Cited in *Atkins v. Chilson*,

The notice "should either state with accuracy the time at which by law he [the tenant] is required to leave the premises or in some other way refer him to his legal rights under the statute." Thus a notice which requires the tenant "being in arrears of rent" to deliver up the premises "forthwith" is not sufficient.<sup>1164</sup>

Where a notice to quit for non-payment of rent has been given under the statute, the forfeiture of the estate does not become absolute until the fourteen days have run out, and a payment or tender of rent due at any time before the expiration of the fourteen days will purge the forfeiture.<sup>1165</sup> It is

11 Met. 121; *Oakes v. Munroe*, 8 Cush. 282; *Sanford v. Harvey*, 11 Cush. 96; *Shumway v. Collins*, 6 Gray, 230; *Hodgkins v. Price*, 137 Mass. 17; *Howard v. Merriam*, 5 Cush. 579; *Currier v. Barker*, 2 Gray, 228; *Finnegan v. Lucy*, 157 Mass. 439; *Page v. Dwight*, 170 Mass. 38; *Proctor v. Moran*, 213 Mass. 405; *McNamara v. Dorey*, 219 Mass. 156; *Goodrich v. Hanson*, 238 Mass. 313.

Probably the signature to such a notice need not be in the handwriting of the landlord. *Finnegan v. Lucy*, 157 Mass. 439, 443.

*Historical.* In *Howard v. Merriam*, 5 Cush. 579, it is said that the reason for the passage of St. 1847, c. 267, was the decision in *Fifty Associates v. Howland*, 11 Met. 99, to the effect that summary process did not lie in case of an alleged forfeiture for non-payment of rent and that such forfeiture was not a termination of the term by its own limitation within the meaning of the statute.

<sup>1164</sup> *Oakes v. Munroe*, 8 Cush. 282. See also *infra*, §§ 160, 161. *Cp.* *Sanford v. Harvey*, 11 Cush. 96; *Shumway v. Collins*, 6 Gray, 230; *Currier v. Barker*, 2 Gray, 228.

<sup>1165</sup> *Hodgkins v. Price*, 137 Mass. 18. Whether a tender after the fourteen days have elapsed would have any effect, *qu.* See also as to tender, *Tuttle v. Bean*, 13 Met. 275.

"At common law, the refusal or neglect to pay rent does not work a forfeiture of the term unless the lease contains express conditions of forfeiture in case of the non-payment of rent. . . . [The statutes] do not provide that the tenant's estate shall be absolutely forfeited either by a failure to pay rent or by the lapse of fourteen days after a written notice to quit is given him. It is certain that the forfeiture does not become absolute until the fourteen days have run out. Until then the tenant has the right to pay or tender the rent and reinstate himself in his rights. The process cannot be brought until fourteen days notice to quit has been given. Until then the forfeiture is at most conditional and may be purged and saved by the payment or tender of the rent due. It cannot be necessary that the tenant should wait until such process is commenced before making his tender. The words of the statute [P. S., c. 121, § 11] unless the tenant

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not necessary to save a forfeiture to tender unpaid taxes, even though the lessor has paid them to prevent the sale of the estate.<sup>1166</sup>

A notice to quit, given after the expiration of the term and the commencement of summary process by the lessor to regain possession, does not amount to a waiver of the former notice and entry.<sup>1167</sup>

The notice determines not only the original demise but any sublease which the tenant may have made.<sup>1168</sup>

§ 146. Agreed notice.—Where there is an agreement between the lessor and the lessee, that, upon the giving of a certain notice by one party or the other party, or either party, the lease may be terminated, such a notice duly given puts an end to the estate.<sup>1169</sup> In order to be duly given, it must expire at the end of a rental period.<sup>1170</sup> Where a lease is made for a number of years, to continue thereafter from year to year, unless terminated by a thirty days' written notice, or any other specific notice, before the expiration of any one year term, the lease can be terminated only by such notice given at such time.<sup>1171</sup>

There have been certain decisions as to what is due notice under various clauses in leases. Thus, a lease provided for rebuilding in case of destruction by fire, and that at any time after fifteen years the lessor might take the premises for re-

'four days at least before the return day of the writ' pays or tenders his rent, imply that the tender may be made at any time after notice to quit." Morton, C. J., in *Hodgkins v. Price*, 137 Mass. 13.

<sup>1166</sup> *Hodgkins v. Price*, 137 Mass. 19. "The statutes provide that as a condition of saving his estate the tenant shall pay or tender the rent; we cannot enlarge it, so as to make it include a tender of the taxes also. It would seem to be just that in such a case the tenant should pay or tender the taxes as to which he was in default; but this is a subject for legislative and not for judicial provision." Per Morton, C. J.

<sup>1167</sup> *Dorrell v. Johnson*, 17 Pick. 267.

<sup>1168</sup> *Foa, Landl. & Ten.*, 2d ed., 491; *Pleasant v. Benson*, 14 East, 236.

<sup>1169</sup> *Wall v. Hinds*, 4 Gray 256 (privilege of lessor, three months' notice). *Noble v. Brooks*, 224 Mass. 288 (notice on or before July 1 of any year to terminate Aug. 31).

As to such an agreement in case of a taking by eminent domain, see *supra*, § 138.

<sup>1170</sup> *Baker v. Adams*, 5 Cush. 99; *Grant v. Barnes*, 177 Mass. 111 (thirty days' notice); *De Friest v. Bradley*, 192 Mass. 346.

<sup>1171</sup> *Carlisle v. Weisopf*, 237 Mass. 183.

building. There was a fire, the lessor evicted the lessee, rebuilt, and eight years later, and after the expiration of the fifteen years, gave the notice. It was held that the notice was of no effect.<sup>1172</sup> So, where a lessor reserved the right to terminate a lease by giving six months' notice, and also provided that the lessee might occupy or have the profit of the premises for a fixed time after the lessor's death, it was held on the facts that the right of termination applied only to the original term of the lease.<sup>1173</sup>

An agreement for termination upon six months' notice requires that the notice must expire at the end of a year of the term,<sup>1174</sup> where the lease is silent upon the matter, and circumstances render it inequitable to have it expire at any other time.

Where an extension provided that "all provisions, agreements, terms and conditions in said lease . . . shall apply to the said term as extended," a privilege of the lessor to cancel the lease applies to the extended term, and may be exercised in spite of improvements made by the lessee upon an oral agreement that if the improvements were made the term should be extended and, as the lessee understood, that he should be allowed to occupy for the full period of the extension.<sup>1175</sup>

Where it was provided that if, at any time after the expiration of the first five years of a lease, the lessor might give thirty days' notice of intention to terminate the lease and pay the lessee a certain sum as liquidated damages, whereupon the lessee should deliver possession; and the lessor gave the notice and tendered the sum, but the lessee refused to accept it or to vacate; and the lessor recovered possession by summary process; it was held the lessee could not subsequently recover the sum mentioned.<sup>1176</sup>

§ 147. **Death.**—"If the lessor reserve a rent to himself it shall determine by his death if he die within the term; but if he reserves the rent generally without showing to whom it

<sup>1172</sup> *Hodgkins v. Price*, 137 Mass. 13.

<sup>1173</sup> *Cumings v. Hackett*, 98 Mass. 51.

<sup>1174</sup> *Baker v. Adams*, 5 Cush. 99. (Case of a boarding-house in which the tenant made his profit chiefly during certain months of the year.)

<sup>1175</sup> *DeFriest v. Bradley*, 192 Mass. 346.

<sup>1176</sup> *Binder v. Gunsenheimer*, 217 Mass. 518. *Cp. Gunsenheimer v. Binder*, 206 Mass. 434.

## § 148 TENANCY FOR YEARS UNDER A WRITTEN LEASE

shall go it shall go to his heirs." <sup>1177</sup> "The rent by the terms of the lease is reserved generally, and is not made payable to any particular person; and it is expressly agreed to be paid quarter yearly during the whole term of three years, which clearly shows that it was not the intention of the parties that the lease should terminate on the death of the lessor; and so it appears also from the facts agreed; for the lessees continued to occupy the demised premises after the death of the lessor and have paid a part of the rent which accrued after that time. Nor does the lessee's agreement to deliver up the premises to the lessor or his attorney peaceably and quietly at the end of the term indicate any different intention; the end of the term in that clause of the agreement must have been understood to refer to the end of the three years." <sup>1178</sup>

As leases at the present time invariably provide that the lessee and his "executors and administrators" shall pay rent to the lessor and his "heirs and assigns," the lease survives the death of either party. <sup>1179</sup> A clause is sometimes inserted in leases that the lessees covenant to pay rent for a certain "term" and "for such further time as they may hold." Such a clause makes immaterial the question whether the lease is terminated by the death of the lessor. <sup>1180</sup>

§ 148. Disclaimer.—As we have seen above, where a lessee expressly denies the title of his landlord, and claims to hold under his own or some other title, the lessor may at his election treat the lease as terminated. <sup>1181</sup>

§ 149. Expiration of time limited. <sup>1182</sup>—When the period for which the lease was created has expired, the lease is at an end unless something is done to keep it alive. The landlord is at once in as of his former estate. <sup>1183</sup> Where rent is payable

<sup>1177</sup> Co. Lit. 47; Plow. 171; *Jaques v. Gould*, 4 Cush. 384.

<sup>1178</sup> *Wilde, J.*, in *Jaques v. Gould*, 4 Cush. 384, 386.

<sup>1179</sup> *Supra*, § 25.

<sup>1180</sup> *Jaques v. Gould*, 4 Cush. 384.

Rents and profits accruing after the testator's death are not assets of his estate. *Gibson v. Farley*, 16 Mass. 280; *Lobdell v. Hayes*, 12 Gray, 236; *Towle v. Swasey*, 106 Mass. 100; *Austin v. Gage*, 9 Mass. 395; *Morrill v. Morrill*, 1 Allen, 132. See *Ex parte Gay*, 5 Mass. 419.

<sup>1181</sup> *Supra*, § 120.

<sup>1182</sup> *Cp.* Tenancy at Will, *infra*, § 171, and Tenancy at Sufferance, *infra*, §§ 179-181.

<sup>1183</sup> *Perkins v. Stockwell*, 131 Mass. 529, 532.

periodically in advance, and is a condition, the right to possession for any period does not vest until payment has been made.<sup>1184</sup>

§ 150. **Sale.**—A lease providing that “if the lessor shall sell” or “the city shall cut off” the premises, the “tenant shall consent thereto,” is determined by the city’s cutting off the premises, and the tenant can recover no damages of the city.<sup>1185</sup> A clause in a lease that the lessor shall have the right to sell the demised premises at any time covered by the lease, by giving the lessee two months’ notice and the privilege of purchasing at the price offered, is enabling and not restrictive; and a sale of the premises, subject to the lease, without notice or proffer to the lessee is not a breach thereof.<sup>1186</sup> A clause reserving the right to the lessor to sell, and providing that any of the demised land sold during the term shall cease to be a part of the demised premises, is valid.<sup>1187</sup>

§ 151. **Termination by principal of lease made by agent.**—Where an agent makes a lease in the absence of his principal from the country, having only authority to take charge of the property and “make it pay the best way he could,”<sup>1188</sup> during the principal’s absence, the landlord may terminate the lease upon his return.

<sup>1184</sup> *Elliott v. Stone*, 1 Gray, 571. See *Duration of Lease*, *supra*, § 41, and as to parol leases, *infra*, § 155.

<sup>1185</sup> *Munigle v. Boston*, 3 Allen, 230. *Cp.* *Knowles v. Hull*, 97 Mass. 206. See also as to Purchase and Sale, §§ 92–94.

<sup>1186</sup> *Callaghan v. Hawkes*, 121 Mass. 298.

<sup>1187</sup> *Shaw v. Appleton*, 161 Mass. 313. To the same effect, *O’Connor v. Daily*, 109 Mass. 235.

<sup>1188</sup> *Antoni v. Belknap*, 102 Mass. 193.

## CHAPTER III

### TENANCY AT WILL

§ 152. **Definition.**—Whenever one enters upon land to use and occupy the premises, with the consent of the owner and without a written lease, he is a tenant at will.<sup>1</sup>

The consent of the owner that the occupation shall be as his tenant is necessary to create the relation; for mere occupation as such, even with the consent of the landlord, is not enough, but may amount only to a mere license. Thus, a joint occupation of premises, with the owner and by his consent, does not, in the absence of agreement, create a tenancy at will.<sup>2</sup> So, evidence of placing signs on a building stating that A would occupy it, and requesting applicants for chambers, offering rooms to applicants, being at the building daily giving directions to workmen, selecting gas fixtures, and having fittings and a safe made to order, is not evidence of occupation by A.<sup>3</sup> Similarly, the mere fact that an officer, who has attached the goods of a tenant at will, leaves them in the building, for a period after the owner has given notice of his intention to claim rent, and then demands and removes them, does not make him liable for use and occupation.<sup>4</sup> So,

<sup>1</sup> *Central Mills v. Hart*, 124 Mass. 123; *Gould v. Thompson*, 4 Met. 224; *Mathews v. Carlton*, 189 Mass. 285; *Knowles v. Hull*, 99 Mass. 562, 565; *Commercial Wharf Co. v. Boston*, 208 Mass. 482, 489; *Sellers v. Frank*, 213 Mass. 298; *Stevenson v. Donnelly*, 221 Mass. 161, 165. See also *Ashley v. Warner*, 11 Gray, 43; *Hooton v. Holt*, 139 Mass. 54; *Cheever v. Pearson*, 16 Pick. 266, 271; *Sanford v. Pierce*, 126 Mass. 146; *Kirchgassner v. Rodick*, 170 Mass. 543.

Formerly it was doubtful whether he was a tenant or a mere licensee. *Number Six v. McFarland*, 12 Mass. 324; *Little v. Pearson*, 7 Pick. 301; *Quincy Parish v. Spear*, 15 Pick. 144; *Cheever v. Pearson*, 16 Pick. 266; See also *Lyon v. Cunningham*, 136 Mass. 532; *Sanders v. Richardson*, 14 Pick. 522.

<sup>2</sup> *Johnson v. Carter*, 16 Mass. 443. *Cp. Porter v. Hubbard*, 134 Mass. 233. As to licenses see *supra*, § 3.

<sup>3</sup> *Bacon v. Parker*, 137 Mass. 312.

<sup>4</sup> *Leonard v. Kingman*, 136 Mass. 123.



where one under an oral lease moves goods in with the consent of a tenant then in possession, and moves them out again before the beginning of the term, and refuses to take the premises, no relation of landlord and tenant exists.<sup>5</sup>

So, posting bills on a fence under a contract with one who had no authority from the owner of the land.<sup>6</sup>

On the other hand, a married woman, who contracts in her own name for the hiring of premises for the occupation of herself and family, can be a tenant at will, although her husband, who lives out of the state, occasionally visits her and contributes to the support of the household.<sup>7</sup> So, one who occupies with the assent of her husband, who is a tenant at will, if she agrees to pay rent.<sup>8</sup>

But, if the relation does exist, the tenant need not occupy in person; thus occupancy by a third person, who is put in possession by the defendant, is evidence of use and occupation.<sup>9</sup> And, where a lessee attempts to put a third person in his place, by a writing not amounting to an assignment of the lease, the fact that during the occupation of such third person with the knowledge of the landlord, bills made out to the lessee were presented to and paid by such third person, does not make the third person a tenant at will of the lessor.<sup>10</sup>

Further, if the tenancy at will exist, occupation, even for life and without the payment of rent, is not inconsistent with such tenancy.<sup>11</sup>

§ 153. *Form of the consent.*—The contract or consent under which the tenant enters may be express, as in the case of an oral lease, or of an oral agreement for a lease,<sup>12</sup> or it may be implied in the actions of the parties.<sup>13</sup> Thus, where a building projected over a property line and the occupant of the

<sup>5</sup> *Mathews v. Carlton*, 189 Mass. 285.

<sup>6</sup> *Stevenson v. Donnelly*, 221 Mass. 161, 165.

<sup>7</sup> *Fiske v. McIntosh*, 101 Mass. 66. *Cp. Miller v. Lang*, 99 Mass. 13; *Sanford v. Pierce*, 126 Mass. 146.

<sup>8</sup> *Rogers v. Coy*, 164 Mass. 391; *Twichell v. McNabb*, 172 Mass. 329.

<sup>9</sup> *Dimock v. Van Bergen*, 12 Allen, 551. See *Currier v. Jordan*, 117 Mass. 260, in which it was held that a plea of tender and profert of rent conclusively admitted the landlord's cause of action.

<sup>10</sup> *Brewer v. Dyer*, 7 Cush. 337.

<sup>11</sup> *Hooton v. Holt*, 139 Mass. 54.

<sup>12</sup> *Flanagan v. Welch*, 220 Mass. 186, 189.

<sup>13</sup> The sending a notice of increase of rent by the landlord addressed to the tenant "or the present occupant," may be shown not to have

building continued to use the whole of it after notice that the adjoining owner would claim rent for the land occupied by the projection, it was held the facts showed a tenancy at will.<sup>14</sup> When the contract is implied, in order to collect rent from the tenant under an action for use and occupation, it is necessary to show an entry and occupation either personally or by a servant or agent; but where it is by an express parol agreement, as in the case of written agreements, no entry or occupation is necessary.<sup>15</sup>

§ 154. Creation by holding over.<sup>16</sup>—A tenant under a lease who holds over after the termination of the lease, does not on that account become a tenant at will; yet, if there is any agreement express or implied, giving him the right to hold over, he becomes such a tenant;<sup>17</sup> and such an agreement may be inferred from circumstances.<sup>18</sup> Where in fact such an agreement has been made the fact that each of the parties supposed the relation was something different is immaterial.<sup>19</sup> But a bare permission to the tenant so holding over to occupy, does not make him a tenant at will. "There must be an agreement shown whereby the one agrees to hold and the other to permit him to hold the possession of the premises."<sup>20</sup> And he does not become a tenant at will by virtue of stipulations in the lease that he will "during said term, and for such further

been intended as a recognition of an assignee of the tenant at will as tenant. *King v. Lawson*, 98 Mass. 309. See Assignment, *infra*, § 167.

<sup>14</sup> *Sellers v. Frank*, 213 Mass. 298.

<sup>15</sup> See *infra*, § 155, also *Currier v. Jordan*, 117 Mass. 260.

<sup>16</sup> As to holding over where there is an agreement to purchase, see *infra*, § 157.

<sup>17</sup> *Edwards v. Hale*, 9 Allen, 464; *Emmons v. Scudder*, 115 Mass. 367; *Porter v. Hubbard*, 134 Mass. 233; *Theological Institute v. Barbour*, 4 Gray, 330. *Cp. Delano v. Montague*, 4 Cush. 42; *Benton v. Williams*, 202 Mass. 189, 192; *Leavitt v. Maykell*, 203 Mass. 506, 510; *Commercial Wharf Co. v. Boston*, 208 Mass. 482, 487.

<sup>18</sup> *Benton v. Williams*, 202 Mass. 189, 192. Thus continued occupation with the consent of the landlord and payment and receipt of rent at the same rate and upon the same days as were required by the lease warrants a finding of a tenancy at will. Owing to the statute requiring tenants at sufferance to pay rent, the question is now one of fact. *Ibid.*

<sup>19</sup> *Leavitt v. Maykell*, 210 Mass. 55. In this case, the landlord supposed the tenant was in under an extension of a lease; and the tenant supposed he was a tenant at sufferance.

<sup>20</sup> *Porter v. Hubbard*, 134 Mass. 233. See *Brewer v. Dyer*, 7 Cush. 337.

term as said lessee or any other person or persons claiming under him shall hold the premises, pay unto the lessors the said quarterly rent upon the day hereinbefore appointed for the payment thereof. These covenants for the payment of rent in case the lessees shall hold over do not give them the right to hold over. . . . As it does not enlarge or alter the term neither does it create an estate at will at the expiration of the term. The holding over is without right on the part of the tenant, and it is through the laches of the landlord and not by his agreement. He may at any time enter and expel the tenant; and the correlative right of the tenant is to quit at any time."<sup>21</sup>

Whether the tenant has held over is, of course, a question of fact.<sup>22</sup>

Where a lease provides a definite term, and that the tenant may continue for a further period unless a certain notice is given, the tenant holds for years and not at will during the further period.<sup>23</sup> On the other hand, if a tenant under a lease makes a parol agreement with the lessor for a renewal, and then, *before* his term is up, notifies the lessor that he will not perform the agreement but nevertheless holds over, he is a tenant at sufferance, not a tenant at will.<sup>24</sup>

Where a lessee becomes a tenant at will by holding over, he holds on the terms and conditions of the lease, except so far as modified by mutual agreement.<sup>25</sup>

<sup>21</sup> Chapman, J., in *Edwards v. Hale*, 9 Allen, 464; *Benton v. Williams*, 202 Mass. 189, 192; *Leavitt v. Maykell*, 203 Mass. 506; *Commercial Wharf Co. v. Boston*, 208 Mass. 482, 487. See *Salisbury v. Hale*, 12 Pick. 422.

Note, in this connection, the provisions of G. L., c. 186, § 3, that "Tenants at sufferance in possession of land or tenements shall be liable to pay rent therefor for such time as they may occupy or detain the same." *Brown v. Magorty*, 156 Mass. 209. See *infra*, § 184.

<sup>22</sup> *Commercial Wharf Corp. v. Boston*, 194 Mass. 460, holding also that a city stands like an individual in the matter.

<sup>23</sup> *Dix v. Atkins*, 130 Mass. 171.

<sup>24</sup> *Delano v. Montague*, 4 Cush. 42. Note that he cannot make himself a tenant at sufferance *after* occupying for a time under such parol agreement. *Emmons v. Scudder*, 115 Mass. 367.

<sup>25</sup> *Walker Ice Co. v. Amer. Steel & Wire Co.*, 185 Mass. 463, 467; *Dimock v. Van Bergen*, 12 Allen, 551; *Weston v. Weston*, 112 Mass. 514, 518; *Commercial Wharf Corp. v. Boston*, 194 Mass. 460; *Benton v. Williams*, 202 Mass. 189, 192; *Leavitt v. Maykell*, 203 Mass. 506, 510; *Commercial Wharf Co. v. Boston*, 208 Mass. 482.

When a lease is *ultra vires* a municipal corporation, a tenancy at will

§ 155. Creation by oral lease.—“An estate or interest in land created without an instrument in writing signed by the grantor or by his attorney, shall have the force and effect of an estate at will only.”<sup>26</sup> The fact that a bond for a deed is given to a tenant at will under a parol lease, has no effect on the latter’s tenancy.<sup>27</sup> If the statute of frauds is not pleaded at the trial and the omission is not then objected to by the plaintiff, it cannot be taken advantage of on exceptions.<sup>28</sup>

The parol lease is not void entirely; its terms fix the rate of rent and the times at which it shall be payable.<sup>29</sup> Where a parol lease is shown, it is not necessary to prove any entry or actual occupation by the tenant; for the obligation to pay

by holding over is likewise *ultra vires*. *Commercial Wharf Co. v. Boston*, 208 Mass. 482.

And see also, as to tenants at sufferance, *infra*, § 184.

<sup>26</sup> G. L., c. 183, § 3; R. L., c. 127, § 3; Pub. St., c. 120, § 3; Gen. St., c. 89, § 2; Rev. St., c. 59, § 29; St. 1783, c. 37, § 1.

Cited in *Rising v. Stannard*, 17 Mass. 285; *Ellis v. Paige*, 1 Pick. 43, 2 Pick. 71 *n*; *Chandler v. Thurston*, 10 Pick. 209; *Hingham v. Sprague*, 15 Pick. 103; *Hollis v. Pool*, 3 Met. 351; *Kelly v. Waite*, 12 Met. 302; *Gleason v. Gleason*, 8 Cush. 32; *Dakin v. Allen*, 8 Cush. 34; *Furlong v. Leary*, 8 Cush. 410; *Elliott v. Stone*, 12 Cush. 176, 1 Gray, 574; *Currier v. Barker*, 2 Gray, 226; *Curtis v. Galvin*, 1 Allen, 215; *Haven v. Adams*, 4 Allen, 93; *Walker v. Sharpe*, 103 Mass. 155; *Sprague v. Quinn*, 108 Mass. 554; *Sanders v. Partridge*, 108 Mass. 558; *White v. Maynard*, 111 Mass. 252; *Boynton v. Bodwell*, 113 Mass. 536; *Amory v. Kannoffsky*, 117 Mass. 351; *Lothrop v. Thayer*, 138 Mass. 473; *Kiernan v. Linnehan*, 151 Mass. 545; *Emery v. Boston Terminal Co.*, 178 Mass. 172, 182; *Sheehan v. Fall River*, 187 Mass. 356; *Mathews v. Carlton*, 189 Mass. 285; *Flanagan v. Welch*, 220 Mass. 186, 189; *Freedman v. Gordon*, 220 Mass. 324; *Smith v. Abbott*, 221 Mass. 326; *Sargent v. Leonardi*, 223 Mass. 556; *Scotti v. Bullock*, 225 Mass. 510; *Dana v. Treasurer & Receiver General*, 227 Mass. 562; *Podren v. Macquarrie*, 233 Mass. 127; *Conahan v. Fisher*, 233 Mass. 234; *People’s Express, Inc. v. Quinn*, 235 Mass. 156.

See also *Howard v. Merriam*, 5 Cush. 563; *Ashley v. Warner*, 11 Gray, 43, and *supra*, § 18.

<sup>27</sup> *Rooney v. Gillespie*, 6 Allen, 74.

<sup>28</sup> *White v. Maynard*, 111 Mass. 250.

<sup>29</sup> *Currier v. Barker*, 2 Gray, 226; *Appleton v. O’Donnell*, 173 Mass. 398; *Flanagan v. Welch*, 220 Mass. 186; *Freedman v. Gordon*, 220 Mass. 324; *Miles v. Janvrin*, 200 Mass. 514, 518. Such a parol agreement “is not void” therefore, “though it may be limited and controlled in its operation by the statute.” *Shaw, C. J.*, in *Currier v. Barker*, 2 Gray, 226. *Cp. supra*, §§ 18, 154, and *infra*, § 184.

rent depends upon the contract, as if it were by specialty.<sup>30</sup>

Conversations between a landlord and the treasurer of a corporation are admissible to show that the corporation is a tenant at will, and to show the terms and conditions of the tenancy.<sup>31</sup>

§ 156. Creation by written lease of uncertain duration.—Where a written lease does not indicate with certainty the duration of the term, only a tenancy at will is created.<sup>32</sup> As where the term was to begin “when said house is suitable to be occupied,” and the only other provision as to duration was that if, after two years from the time the lessee should move in, the lessor should wish to live there, he might, and the lessee might retain certain rooms “for such a term as might be agreeable to us both.”<sup>33</sup>

§ 157. Entry under agreement to purchase or lease.—As the form of the contract or consent necessary to create the relation of tenant at will is immaterial, one who enters and occupies premises under an agreement to purchase, but before the deed is actually executed and delivered, is a tenant at will.<sup>34</sup>

The status of such a tenant is in some respects peculiar. It has been said “that neither the designation of licensee nor of tenant at will expresses all the rights and obligations of such

<sup>30</sup> *Elliott v. Stone*, 1 Gray, 571, 574; *Ellis v. Paige*, 1 Pick. 45; *Hollis v. Pool*, 3 Met. 350; *Kelly v. Waite*, 12 Met. 300; *Fuller v. Swett*, 6 Allen, 219 n.; *Currier v. Jordan*, 117 Mass. 260; *Taylor, Landl. & Ten.*, 9th ed., §§ 15, 624. G. L., c. 183, § 3, makes a parol lease *create* a tenancy at will *ipso facto*.

<sup>31</sup> *Walker Ice Co. v. Amer. Steel & Wire Co.*, 185 Mass. 463, 473.

<sup>32</sup> *Murray v. Cherrington*, 99 Mass. 229; *Cheever v. Pearson*, 16 Pick. 271.

<sup>33</sup> “It may be conceded that a lease for years may begin ‘when a house is suitable to be occupied’ according to the maxim *Id certum est quod certum reddi potest*.’ . . . It is indisputable that an entry by the lessee under this instrument would not bind him to remain for any definite period. . . . As to him there can be no term of certain duration. Consequently there can be none as to the landlord.” Per Foster, J., in *Murray v. Cherrington*, 99 Mass. 229.

<sup>34</sup> *Gould v. Thompson*, 4 Met. 224; *Foley v. Wyeth*, 2 Allen, 131; *Towne v. Butterfield*, 97 Mass. 105; *Dunham v. Townsend*, 110 Mass. 440; *Emmons v. Scudder*, 115 Mass. 367; *Lyon v. Cunningham*, 136 Mass. 532, 538; *Lawton v. Savage*, 136 Mass. 111. See *Cheever v. Pearson*, 16 Pick. 271; *Dakin v. Allen*, 8 Cush. 34; *King v. Johnson*, 7 Gray, 239; *No. Six v. McFarland*, 12 Mass. 325.

an occupant is manifest. The contract of purchase may be one that the courts will under the circumstances specifically enforce; if the contract is in writing, the parties have their action at law for a breach of it; and the rights of a party are not the same if he breaks the contract as if he keeps it."<sup>35</sup> One who becomes a tenant at will by this method is not entitled to consider himself a tenant at sufferance, even though the landlord had, previous to entry, promised to repair the building and had failed to do so. It should be noted that a bond to convey certain premises on payment of a note and interest quarterly, and meanwhile to allow the obligee to occupy, gives the obligee a present title so long as he complies with the terms of the bond, and therefore a subsequent conveyance by the owner to a third person does not terminate his estate, for he is not a tenant at will.<sup>36</sup> It has been said that this kind of tenancy at will has some important peculiarities. The tenant is not liable to pay rent without a special agreement;<sup>37</sup> and the same is true where having paid rent under

<sup>35</sup> Field, J., in *Lyon v. Cunningham*, 136 Mass. 532. Such a person is not a "lessee" within a statute providing that lessees shall pay certain taxes. *Corcoran v. Boston*, 193 Mass. 586. See also *Kiernan v. Linnehan*, 151 Mass. 543.

<sup>36</sup> *White v. Livingston*, 10 Cush. 259.

<sup>37</sup> *Dakin v. Allen*, 8 Cush. 33, 35; *King v. Johnson*, 7 Gray, 239; *Welch v. Andrews*, 9 Met. 78 (where, however, there was an express agreement to that effect); *Dunham v. Townsend*, 110 Mass. 440; *Little v. Pearson*, 7 Pick. 301; *Washburn v. White*, 197 Mass. 540, 543. This is on the theory that "the purchase price for the land, when paid, constitutes the consideration for the property, including the use of it after possession is taken and the property transferred." *Washburn v. White*, 197 Mass. 540, 543, per Knowlton, C. J. *Cp.* *Westgate v. Wixon*, 128 Mass. 304.

In *Gould v. Thompson*, 4 Met. 224, where the house on the premises was destroyed by fire, and the occupant refused to complete the purchase, he was held liable for actual occupation. See *Dunham v. Townsend*, 110 Mass. 440, 442; *Lyon v. Cunningham*, 136 Mass. 532, 539. Compare the case of a mortgagor in possession. *Larned v. Clarke*, 8 Cush. 29, and *supra*, § 5. And the agreement to purchase may specifically exempt him from payment of rent.

"But it is to be borne in mind that the entry and occupation of the premises by the defendant were under a written contract, and that the rights of the parties are to be regulated by its terms. By the contract it was stipulated that the defendant should enter upon and retain possession of the premises 'without any charge for rent.' This express con-

a lease containing provisions as to purchase, he holds over.<sup>38</sup> Nor is he subject to the statutory proceedings to terminate the tenancy.<sup>39</sup> Such a tenant is not required to give the statutory notice required to terminate ordinary tenancies at will,<sup>40</sup> nor has he any right to remove structures annexed by him to the freehold. The reason of this rule as to fixtures has been stated as follows: "The occupant has paid no equivalent for the use and enjoyment of the premises; nor is he compelled to surrender the estate at a fixed period of time, as upon the expiration of a term demised. He can, by fulfilling his contract of purchase, become the owner of the estate, and enjoy the full benefit of all the erections and improvements which he has made thereon. There is, therefore, no reason for applying to a case of this sort the very liberal rule in regard to fixtures which prevails where the relation of lessor and lessee subsists between the parties."<sup>41</sup>

Similarly, one who enters under a contract for a written lease is a tenant at will;<sup>42</sup> but he is liable to pay for use and occupation,<sup>43</sup> and the parol agreement is evidence of the value of the premises.<sup>44</sup> "If the lease agreed to be given reserves rent, and the intended lessee is let into possession and holds during a part of the term intended to be created by the lease, it is a natural inference that the parties intended that rent should be paid for the occupation during this part of the term. . . . A person so let in under an agreement for a lease has uniformly, so far as we know, been held liable for use and

tract necessarily excludes any implication of such a promise as would ordinarily arise from the use by one man of the real estate of another, to pay a reasonable rent therefore." Dewey, J., in *Welch v. Andrews*, 9 Met. 78.

<sup>38</sup> *Washburn v. White*, 197 Mass. 540.

<sup>39</sup> *Dakin v. Allen*, 8 Cush. 33; *Howard v. Merriam*, 5 Cush. 564, 583; *Hastings v. Pratt*, 8 Cush. 121; *Washburn v. White*, 197 Mass. 549; *Kiernan v. Linnehan*, 151 Mass. 543. *Cp.* *Currier v. Jordan*, 117 Mass. 260.

<sup>40</sup> *Lyon v. Cunningham*, 136 Mass. 542. *Cp.* *Emmons v. Scudder*, 115 Mass. 367.

<sup>41</sup> Bigelow, J., in *King v. Johnson*, 7 Gray, 239, 241.

<sup>42</sup> *Lyon v. Cunningham*, 136 Mass. 532; *Emmons v. Scudder*, 115 Mass. 367.

<sup>43</sup> *Lyon v. Cunningham*, 136 Mass. 541.

<sup>44</sup> *Emmons v. Scudder*, 115 Mass. 373. See G. L., c. 186, § 5; and *infra*, §§ 256, 264. *Cp.* *Currier v. Jordan*, 117 Mass. 260; *King v. Johnson*, 7 Gray, 239.



occupation during the time of actual occupation, unless there is found to be an agreement to the contrary.”<sup>45</sup>

If the owner refuses to carry out his part of the contract and tender the lease, the tenant may elect to rescind the contract and is liable only for the time for which he has actually used the premises.<sup>46</sup> If a tenant, after the expiration of his lease, continues in possession under a new agreement, express or implied for a lease, evidence that the tenant underlet part of the building which was not let to him by the former lease, but was included in the new agreement, is evidence of an entry by him under the new agreement, even though the rent was paid under protest.<sup>47</sup>

§ 158. **Incidents of tenancy.**—A tenant at will, like any other tenant, is under an implied agreement to “use the premises in a tenant-like manner, and not by his voluntary act unnecessarily to injure them,”<sup>48</sup> and “acceptance by the landlords of rent for the full term was not necessarily a waiver of their right to recover damages for a breach of this contract. It was merely evidence for the consideration of the jury upon the question whether there was a waiver. A liability in damages for an act of this kind may well be enforced in an action of contract, notwithstanding that the rent has been fully paid.”<sup>49</sup> So “a tenant at will who commits voluntary waste is liable to his landlord in an action of trespass *quare clausum*. His act terminates his right as a tenant and entitles the landlord to treat him as a trespasser in doing it.”<sup>50</sup> He is not, however, liable for permissive waste.<sup>51</sup>

<sup>45</sup> *Lyon v. Cunningham*, 136 Mass. 540, per Field, J.

<sup>46</sup> “Tenancies from year to year are unknown in this Commonwealth, but an agreement may perhaps be inferred that the occupant is let in as an ordinary tenant at will until the lease is delivered from circumstances which would not warrant this inference if the contract was for an absolute purchase. The payment and acceptance of rent unexplained is strong, if not conclusive evidence of such tenancy.” *Ibid.*

<sup>47</sup> *Lyon v. Cunningham*, 136 Mass. 532.

<sup>48</sup> *Emmons v. Scudder*, 115 Mass. 367.

<sup>49</sup> *Chalmers v. Smith*, 152 Mass. 561, Knowlton, J.; *Means v. Cotton*, 225 Mass. 213, 219; *United States v. Bostwick*, 94 U. S. 53, 66. See *infra*, §§ 202–204, 274–276.

<sup>50</sup> *Chalmers v. Smith*, 152 Mass. 561, Knowlton, J.; *Means v. Cotton*, 225 Mass. 313, 319.

<sup>51</sup> *Chalmers v. Smith*, 152 Mass. 561, per Knowlton, J.; *Daniels v. Pond*, 21 Pick. 367; *Lothrop v. Thayer*, 138 Mass. 466, 473. See *infra*, § 204.

<sup>51</sup> *Co. Lit.* 57a, *note*; *Harnett v. Maitland*, 16 M. & W. 256; *Daniels v.*



The proper action in which to recover from a tenant at will for the use of the premises is a count for use and occupation not a count for rent.<sup>52</sup> The action lies after the tenant has left the premises without giving due notice of his intention to terminate his tenancy, although he afterward derives no benefit therefrom.<sup>53</sup>

A tenant at will has both the possession and right of possession of the estate, therefore he may maintain trespass *quare clausum* against his landlord.<sup>54</sup> For the same reason, the remedy of the landlord, during the existence of the tenancy, for an injury to his reversionary interest by a stranger formerly was by action on the case, and not by trespass *quare clausum*.<sup>55</sup>

A tenant at will evicted without notice may recover damages for a period up to the time when the tenancy might have been terminated by the landlord, even in an action brought before the expiration of that time, but for no longer.<sup>56</sup>

§ 159. Termination of tenancy.—Generally.—Tenancies at will could formerly be terminated at the will of either party, subject to certain equitable restrictions, but now are terminated either by giving a notice, the length of which is prescribed by statute, or by the operation of law in certain cases, or in some other method agreed upon beforehand.<sup>57</sup>

Pond, 21 Pick. 367; Lothrop *v.* Thayer, 138 Mass. 466, 473; Means *v.* Cotton, 225 Mass. 313, 319.

<sup>52</sup> Walker *v.* Furbush, 11 Cush. 366; Warren *v.* Ferdinand, 9 Allen, 357; Rogers *v.* Coy, 164 Mass. 391. See *infra*, §§ 240, 255, 256.

In Warren *v.* Ferdinand, Chapman, J., said: "Before the existence of the practice act the general count for use and occupation was proper for the recovery of rent due from a tenant occupying under a parol demise. To maintain the action for use and occupation it was necessary to prove a tenancy under a parol demise." After the practice act "if a claim for rent under a parol demise is his cause of action it is well described by a count for use and occupation."

<sup>53</sup> Walker *v.* Furbush, 11 Cush. 366. As to actions against guarantors, see *supra*, § 64b.

<sup>54</sup> Dickerson *v.* Goodspeed, 8 Cush. 119; Porter *v.* Hubbard, 134 Mass. 233.

<sup>55</sup> French *v.* Fuller, 23 Pick. 104. Compare *infra*, §§ 350, 351.

<sup>56</sup> Ashley *v.* Warner, 11 Gray, 43.

<sup>57</sup> *Historical. Termination of tenancy at will at common law.* At common law a tenancy at will was at the will of both parties, but whether notice was necessary was doubtful. That no notice was necessary was

In any case of termination of tenancy, whether by notice to quit or by any other method giving the lessor the right to enter, it is not necessary in addition to such entry to expel the tenant in order to revest the possession in the landlord, but upon such reëntry the tenant becomes a trespasser.<sup>58</sup>

"Where the tenant denies the title of his landlord, or does definite acts inconsistent with it, as by accepting a deed from some one other than the landlord and asserting title under it, the tenancy at will may be terminated by the landlord without any notice to quit. He may bring his action against the tenant as a disseisor, or trespasser, as if he had originally entered by wrong; or he may, if he can do so without violence, repossess himself of the premises. . . . No notice to quit is ever necessary unless the relation of landlord and tenant exists and a disclaimer of tenancy dispenses with such notice."<sup>59</sup>

If the landlord expresses his notice to quit to be "for non-payment of rent," he cannot afterward treat it as a notice to terminate the tenancy. Whether he could do so under a notice worded generally, *quære*.<sup>60</sup>

After the termination of the tenancy by any legal method,

held in *Ellis v. Paige*, 1 Pick. 43; *Howard v. Merriam*, 5 Cush. 570; see also *Wilder v. Houghton*, 1 Pick. 88; and "any act of ownership exercised by the lessor on the land which is inconsistent with the nature of an estate at will, will operate as a determination of it. Thus if the landlord enters on the land demised, and cuts down trees or makes a feoffment, or lease for years, to commence immediately, the estate at will is thereby determined." *Rising v. Stannard*, 17 Mass. 286. But the lessee had a reasonable time to remove. *Ellis v. Paige*, 1 Pick. 43. See *Hodgkins v. Price*, 137 Mass. 13. But in *Coffin v. Lunt*, 2 Pick. 71, Parker, C. J., says the question whether notice is necessary is unsettled, and if any be necessary it should be the interval between rent days. See *Prescott v. Elm*, 7 Cush. 347, where it is said that St. 1825, c. 89, § 4, adopted the common law of England except as to tenants who do not pay rent.

At common law, the mere refusal or neglect to pay did not work a forfeiture of the term unless the lease contains express conditions of forfeiture in case of the non-payment of rent. *Hodgkins v. Price*, 137 Mass. 13.

<sup>58</sup> *Curl v. Lowell*, 19 Pick. 25; *Dorrell v. Johnson*, 17 Pick. 263, 267. See *Ellis v. Paige*, 1 Pick. 43.

<sup>59</sup> *Appleton v. Ames*, 150 Mass. 34, 44, per Devens, J. *Cp.* Forfeiture by Disclaimer, *supra*, § 120.

<sup>60</sup> *Tuttle v. Bean*, 13 Met. 275, 277, per Shaw, C. J.

the tenant cannot maintain trespass either against the landlord or a new tenant.<sup>61</sup>

§ 160. Termination of tenancy by notice to terminate.<sup>62</sup>—The General Laws provide: "Estates at will may be determined by either party by three months' notice in writing for that purpose given to the other party; and if the rent reserved is payable at periods of less than three months, the time of such notice shall be sufficient if it is equal to the interval between the days of payment."<sup>63</sup> Such notice need not apparently be signed by the landlord or tenant personally.<sup>64</sup>

<sup>61</sup> *Mentzner v. Hudson Savings Bank*, 197 Mass. 325, 331.

<sup>62</sup> *Cp. supra*, § 145, and *infra*, § 161.

<sup>63</sup> G. L., c. 186, § 12; R. L., c. 129, § 12; Pub. St., c. 121, § 12; Gen. St., c. 90, § 31; Rev. St., c. 60, § 26; St. 1825, c. 89, § 4.

Cited in *Cheever v. Pearson*, 16 Pick. 272; *Kinsley v. Ames*, 2 Met. 31; *Benedict v. Morse*, 10 Met. 230; *Kelley v. Waite*, 12 Met. 302; *Howard v. Merriam*, 5 Cush. 577; *Prescott v. Elm*, 7 Cush. 348; *French v. Fuller*, 23 Pick. 104; *Hollis v. Pool*, 3 Met. 351; *Whitney v. Gordon*, 1 Cush. 268; *Cooper v. Adams*, 6 Cush. 91; *Gleason v. Gleason*, 8 Cush. 32; *Sanford v. Harvey*, 11 Cush. 95; *Walker v. Furbush*, 11 Cush. 367; *Elliott v. Stone*, 12 Cush. 177; *Currier v. Barker*, 2 Gray, 226; *Steward v. Harding*, 2 Gray, 336; *Evans v. Reed*, 5 Gray, 308; *Batchelder v. Batchelder*, 2 Allen, 106; *Walker v. Sharpe*, 14 Allen, 44; *Walker v. Sharpe*, 103 Mass. 154; *Sprague v. Quinn*, 108 Mass. 554; *Boynton v. Bodwell*, 113 Mass. 536; *Davis v. Murphy*, 126 Mass. 143; *Lyon v. Cunningham*, 136 Mass. 539; *Finnegan v. Lucy*, 157 Mass. 443; *Emerson v. Somerville*, 166 Mass. 115; *Whicher v. Cottrell*, 165 Mass. 351; *Taylor v. Tuson*, 172 Mass. 146; *Mentzner v. Hudson Savings Bank*, 197 Mass. 325, 330, 331; *Leavitt v. Maykel*, 210 Mass. 61; *Scotti v. Bullock*, 225 Mass. 510; *Fratti v. Jannini*, 226 Mass. 434.

*Historical.* Formerly, a reasonable notice was required of intention to terminate a tenancy at will. *Coffin v. Lunt*, 2 Pick. 70; *Ellis v. Paige*, 2 Pick. 71 n; *Cutler v. Winsor*, 6 Pick. 335, 339.

"By St. 1825, c. 89, § 4, commonly called the landlord and tenant act, tenants at sufferance and will were put on the same footing in regard to notice; and it was provided that such tenancies might be terminated by either party by three months' notice with some modification where the rent was payable more frequently than quarterly. But the Rev. Sts., c. 60, § 26, which provide that estates *at will* may be determined by three months' notice, designedly omit tenancies at sufferance because, as the commissioners say in their note to this section so long as the party continues to be a mere tenant at sufferance his estate is, and ought to be, determinable at any moment at the pleasure of the landlord." *Shaw, C. J.*, in *Kinsley v. Ames*, 2 Met. 31; *Benedict v. Morse*, 10 Met. 230.

<sup>64</sup> *Finnegan v. Lucy*, 157 Mass. 443.

The notice of intention to terminate the tenancy must follow the terms of the statute, and should either specify the exact day upon which the next rental period expires, or should state generally that the tenancy will be terminated at the end of, for example, one month from the next rent-day, if the rental period be one month.<sup>65</sup> The mere fact that the rent was not in arrear will not justify a presumption that the tenant knows that the notice is to terminate the tenancy, when the notice itself fails to state the fact.<sup>66</sup> "It is by no means necessary to name the precise day and date on which a tenancy is to expire, in a notice to quit, but it may be designated in general terms if stated correctly. Therefore a notice to quit at the end of the month or quarter [or week] (as the case may be) which will expire next subsequent to the day when the rent shall again become due, without specifying the exact day of the month, would be sufficient to terminate a tenancy at will, under our statutes, after a lapse of the requisite time from the giving of the notice."<sup>67</sup> But a notice that "from this date you will please collect your rent from B, as I have disposed of my store to said B," does not satisfy the statute.<sup>68</sup> So, a notice "you are hereby notified to quit the premises by you now occupied. . . . This notice is given for the purpose of terminating your tenancy of the said premises," is insufficient as not fixing the day when the tenant is to quit, or referring plainly to the statute.<sup>69</sup> Similarly, a notice "to quit forthwith" is not sufficient.<sup>70</sup>

If a particular day is named in the notice, it should on principle be the last day of a rental period, and not the succeeding day; that is to say, the notice should expire on the last day of the week or month constituting a rental period, and not on the first day of the week or month.<sup>71</sup> In a tenancy "beginning with January 1," where the rent is to be paid

<sup>65</sup> *Sanford v. Harvey*, 11 Cush. 93; *Currier v. Barker*, 2 Gray, 224; *Boynton v. Bodwell*, 113 Mass. 526.

<sup>66</sup> *Currier v. Barker*, 2 Gray, 224.

<sup>67</sup> Bigelow, J., in *Sanford v. Harvey*, 11 Cush. 93, 96.

<sup>68</sup> *Whicher v. Cottrell*, 165 Mass. 351.

<sup>69</sup> *Steward v. Harding*, 2 Gray, 336.

<sup>70</sup> *Oakes v. Munroe*, 8 Cush. 286. See *infra*, § 161.

<sup>71</sup> Taylor on Landlord and Tenant, 9th ed., § 477; Crocker's Notes on Common Forms, 4th ed., 337; *Atkins v. Sleeper*, 7 Allen, 487; *Bay State Bank v. Kiley*, 14 Gray, 492. In the latter case the notice dated May 1 was to quit "at the expiration of one month from this date." Accord-

on the first of each month, the rent day is the first day of a rental period; but if the tenancy is "from the first day of January," the first day of the month is both a rent day and the end of a rental period.<sup>72</sup> The Supreme Judicial Court, however, in cases in which the former situation was presented, viz., where by an agreement rent was payable on the first day of the month for the preceding month, has held with some hesitation that a notice given on the first day of the month and which expired on the first day of the following month was sufficient, basing its opinion largely on the wording of the statute.<sup>73</sup> The court said: "If we sustain the ruling of the court in this case, we must hold that there ought to have been a notice to quit on the day before the rent day, and served at some time prior to the preceding rent day. . . . We must hold that the notice should terminate on a day when rent is payable; and it will then follow that the notice will not be sufficient in such a case as this, though it is equal to the interval between the days of payment, but must be at least one day longer than that interval. This would be directly contrary to the statute. We do not feel at liberty to carry the construction of a statute to such a length. It is to be considered that the object of the statute was to fix an arbitrary rule for the determination of estates at will by written notice. Its language is plain. For the reasons stated in the cases above cited, the court held that such notices must terminate on a day when rent was payable. There is no sound reason for going further, and holding that in some cases the notices must be given for a greater length of time than the statute requires."<sup>74</sup> The ex-

ing to the statement of facts the notice was served on May 1 and the trial judge ruled that if the monthly term began on the first day of the month, it would end on the last and so the notice would be bad on its face. The jury so found. On exceptions Dewey, J., said, p. 494, after erroneously stating the notice to have been given on May 2: "the presiding judge properly ruled that if the monthly term began on the first day of the month, it would end on the last, and so the notice on the face of it was bad." The case therefore in effect sustains the opinion in the text.

<sup>72</sup> *Atkins v. Sleeper*, 7 Allen, 487.

<sup>73</sup> *Walker v. Sharpe*, 14 Allen, 43.

The court distinguished *Bay State Bank v. Kiley*, 14 Gray, 492, on the ground that in that case the first day of the month was not the rent day, as in this case.

<sup>74</sup> *Walker v. Sharpe*, 14 Allen, 43, 46, per Chapman, J.

In accord with the above case the court held that where a tenant en-

planation of this apparent conflict of statement may be found in the rule of the common law, according to which the *last* day of a term *was* the *rent day*, and rent was due at the end of that day, although for convenience the landlord was entitled to demand it at sunset.<sup>75</sup> Hence the rule as to notice came to be stated in its present form, viz., that under the statute the notice must be given not later than the day corresponding to the rent day, to terminate on the following rent day.<sup>76</sup>

If, therefore, a notice is given in the middle of a rental period which states that the tenancy is to be terminated at the end of one rental period from the date thereof, it is ineffective to terminate the tenancy even at the second rent day after its date.<sup>77</sup> And the date of a notice to quit cannot be presumed in the absence of other evidence to be one of the days on which rent is payable.<sup>78</sup> A notice that the tenant will quit on Nov. 1, a rent day, which was not received by the landlord until Oct. 2 is insufficient.<sup>78a</sup> Probably a notice, which names a day *after* the expiration of the necessary period, is bad although given long enough before the proper day.<sup>79</sup> The

tered May 7 and paid rent June 7, a notice given June 7 to quit on July 7 was sufficient. *Clark v. Keliher*, 107 Mass. 406, 409.

Similarly, where the rent was payable weekly. *Hultain v. Munigle*, 6 Allen, 220.

<sup>75</sup> 2 Taylor, Landl. and Ten., 9th ed., § 477.

As the tenant has the whole of the last day of the term in which to pay, suit cannot be brought until the last day has fully expired. *Decker v. McManus*, 101 Mass. 63.

<sup>76</sup> *Walker v. Sharpe*, 14 Allen, 43; *Clark v. Keliher*, 107 Mass. 406; *Bay St. Bank v. Kiley*, 14 Gray, 492; *Blish v. Harlow*, 15 Gray, 316; *Atkins v. Sleeper*, 7 Allen, 487; *Baker v. Adams*, 5 Cush. 99; *Prescott v. Elm*, 7 Cush. 346; *Hultain v. Munigle*, 6 Allen, 220; *Sanford v. Harvey*, 11 Cush. 93; *Currier v. Barker*, 2 Gray, 226; *Means v. Cotton*, 225 Mass. 313.

<sup>77</sup> *Sanford v. Harvey*, 11 Cush. 93, 95. Bigelow, J., said: "It is a well settled rule of law, applicable to notices to quit, that, in order to be valid, the day on which the tenancy is to be terminated by the notice must be truly stated, and that any mistake in this respect will be fatal."

In a case where part of the consideration for the demise was the boarding of the lessor for a certain part of the year and the lease provided that it might be terminated upon six months' notice, it was held the notice must expire with the end of a year of the term. *Baker v. Adams*, 5 Cush. 99 (case of a written lease).

<sup>78</sup> *Prescott v. Elm*, 7 Cush. 349.

<sup>78a</sup> *Means v. Cotton*, 225 Mass. 313.

<sup>79</sup> *Spicer v. Lea*, 11 East, 314; *Sanford v. Harvey*, 11 Cush. 93, 95.

## TERMINATION OF TENANCY BY NOTICE TO TERMINATE § 160

parties may, however, provide that a certain notice shall be sufficient, so that the tenancy will end with the expiration of the notice irrespective of the rent day.<sup>80</sup>

The principles of notice to terminate apply equally, no matter on what day of the term the rent is payable. Thus, where the rent is payable in advance, the notice must still be equal to the period between two rent days, and must terminate on a rent day.<sup>81</sup>

If a tenant at will quits the premises on a rent day without having given previous notice, he is *prima facie* liable for another instalment of rent, and the burden is on him to show that the landlord had waived the notice;<sup>82</sup> and not merely is he liable for the succeeding rental period, but for subsequent periods, that is to say his vacating the premises does not determine the tenancy, unless there be an express surrender.<sup>83</sup> The burden of proving a waiver of notice to terminate tenancy, and of proving surrender and acceptance is on the tenant.<sup>83a</sup>

An agreement that the tenant may quit whenever he pleases does not dispense with the obligation to give notice,<sup>84</sup> nor does the mere fact that the remuneration for the enjoyment of premises under a parol lease takes some other form than money.<sup>85</sup>

<sup>80</sup> "Either party may terminate the tenancy by giving one month's notice to the other in writing." *May v. Rice*, 108 Mass. 150. Morton, J., said, p. 152: "There is no provision in the contract that the month's notice shall expire at the end of a quarter, or of a calendar month; and we ought not to introduce into it by implication, such stipulation, unless it clearly appears from the whole contract that such was the intention of the parties."

<sup>81</sup> *Walker v. Sharpe*, 14 Allen, 43.

<sup>82</sup> *Whitney v. Gordon*, 1 Cush. 266; *Walker v. Furbush*, 11 Cush. 366; *Taylor v. Tuson*, 172 Mass. 145.

<sup>83</sup> *Taylor v. Tuson*, 172 Mass. 145; *Batchelder v. Batchelder*, 2 Allen, 105; *Leavitt v. Maykell*, 203 Mass. 506, 510; s. c., 210 Mass. 55.

*Cf. Means v. Cotton*, 225 Mass. 313.

<sup>83a</sup> *Leavitt v. Maykell*, 210 Mass. 55.

<sup>84</sup> *Batchelder v. Batchelder*, 2 Allen, 105. But see *Davis v. Murphy*, 126 Mass. 143, to the effect that notice may be dispensed with by an agreement to that effect.

<sup>85</sup> *Gleason v. Gleason*, 8 Cush. 32. "If the agreement to take care of the trees was in the nature of an agreement to pay rent, and the failure to perform the stipulated duty was a neglect to pay rent, the plaintiff had no right of entry till after fourteen days' notice to quit; if it was not such a case, then not until after three months' notice," per Wilde, J.



Nor does an agreement to pay rent in advance. Such an agreement "is at most a condition subsequent and not a conditional limitation. . . . The tenant cannot treat the tenancy as terminated by reason of his failure to comply with his agreement to pay rent in advance."<sup>86</sup> There may, however, be not only an agreement to pay rent in advance, but that if the tenant fails to do so he shall leave the premises. This amounts to a condition precedent to the vesting of the estate from period to period.<sup>87</sup>

An undertenant after the termination of the tenant's estate is of course not entitled to notice.<sup>88</sup> Notice to a tenant paying rent monthly that after a certain day rent will be raised and payable weekly, does not, unless agreed to by the tenant, prevent the landlord from giving a month's notice to terminate the tenancy.<sup>89</sup>

The principles of notice in relation to termination of tenancies have no application to covenants. Thus, where the landlord agreed to furnish the tenant with steam power as long as he, the landlord, saw fit, the tenant was held not to be entitled to any notice of intention to shut off such power.<sup>90</sup>

Where the landlord gives a written lease to another, thus terminating the tenancy,<sup>91</sup> it is immaterial whether a notice to terminate previously given was a compliance with the statute or not.<sup>92</sup> The method provided by the statute is not exclusive,<sup>93</sup> therefore.

§ 161. Termination of tenancy, by notice to quit for non-payment of rent.<sup>94</sup>—The General Laws provide: "In case of neglect or refusal to pay the rent due from a tenant at will, fourteen days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the tenancy."<sup>95</sup>

<sup>86</sup> Morton, J., in *Sprague v. Quinn*, 108 Mass. 554; *Elliott v. Stone*, 12 Cush. 174; *Bartlett v. Greenleaf*, 11 Gray, 98.

<sup>87</sup> *Elliott v. Stone*, 1 Gray, 571.

<sup>88</sup> *Evans v. Reed*, 5 Gray, 308; *Hollis v. Pool*, 3 Met. 350. *Cp. Stone v. Lahey*, 133 Mass. 426; *Low v. Elwell*, 121 Mass. 309.

<sup>89</sup> *Blish v. Harlow*, 15 Gray, 316.

<sup>90</sup> *Shorey v. Farrell*, 114 Mass. 441.

<sup>91</sup> *Infra*, § 174.

<sup>92</sup> *Mentzner v. Hudson Savings Bank*, 197 Mass. 325, 330.

<sup>93</sup> *Mentzner v. Hudson Savings Bank*, 197 Mass. 325, 331.

<sup>94</sup> *Cp.* §§ 160, 162-164.

<sup>95</sup> G. L., c. 186, § 12; R. L., c. 129, § 12; Pub. St., c. 121, § 12; Gen. St., c. 90, § 31; Rev. St., c. 60, § 26; St. 1825, c. 89, § 4.

Cited in *Quincy Parish v. Spear*, 15 Pick. 147; *Benedict v. Morse*, 10



"The purpose of the statute in regard to tenancies at will was, not to provide any new method of determining such tenancies but merely to fix a period of time which should be deemed a reasonable notice to the tenant of the determination of the lease." <sup>95</sup>

Under this statute, it is not necessary for the landlord to make any demand for the rent due before giving the notice to quit, as it is the tenant's duty to pay without demand; <sup>96</sup> and the fact that the landlord may be indebted to the tenant at the time, in a sum greater than the amount of rent due, is immaterial. <sup>97</sup>

The notice must substantially follow the form of the statute; it "must fix a day or time to quit, at or after the expiration of the required time of notice by definitely naming the day, or denoting such time with reasonable exactness and certainty." <sup>98</sup> "We think the notice to quit should be in such form as to indicate to the tenant, that the lessor, in giving the notice was acting under the statute, and with a view to the remedy provided by it, to recover possession of the demised premises. This is necessary, in order that the tenant may have the full time given him by law to quit the premises voluntarily and avoid the cost of a summary process for his eviction. The notice, therefore, should either state with accuracy the time at which, by law, he is required to leave the premises, or in some way refer him to his legal rights under the statute. It may be that a notice in general terms to quit the premises without specifying any time, if given fourteen days before the commencement of process would be sufficient; because, as every one is supposed to know, the tenant, if in arrears of

Met. 230; *Rising v. Stannard*, 17 Mass. 285; *Howard v. Merriam*, 5 Cush. 563; *Whitney v. Gordon*, 1 Cush. 266; *Hildreth v. Conant*, 10 Met. 298; *Tuttle v. Bean*, 13 Met. 277; *Gleason v. Gleason*, 8 Cush. 32; *Dickinson v. Goodspeed*, 8 Cush. 120; *Oakes v. Munroe*, 8 Cush. 286; *Elliott v. Stone*, 12 Cush. 177; *Kimball v. Rowland*, 6 Gray, 224; *Johnson v. Stewart*, 11 Gray, 181; *Leavitt v. Maykel*, 210 Mass. 61; *Fratti v. Jannini*, 226 Mass. 430; *Dowd v. Lawlor*, 238 Mass. 313. See *Meador v. Stone*, 7 Met. 147.

<sup>95</sup> *Morton, C. J.*, in *Hodgkins v. Price*, 137 Mass. 13.

<sup>96</sup> *Kimball v. Rowland*, 6 Gray, 224; *Borden v. Sackett*, 113 Mass. 214, 217.

<sup>97</sup> *Borden v. Sackett*, 113 Mass. 214.

<sup>98</sup> *Shaw, C. J.*, in *Currier v. Barker*, 2 Gray, 224, 228; *Sanford v. Harvey*, 11 Cush. 93, 96; *Granger v. Brown*, 11 Cush. 191. See opinion of *Bigelow, J.*, in *Sanford v. Harvey*, cited *supra*, § 160.

rent, would be by such notice referred to the statute. But certainly, if it contains any specification of the time when the tenant is required to quit the premises, it should specify it truly, otherwise it would serve to mislead him and thus defeat the very purpose for which it was intended.”<sup>99</sup>

Where the notice does not fix any time for the tenant to quit by naming a day or otherwise, it operates as a demand to quit and deliver up the premises forthwith,<sup>100</sup> and a notice to quit “forthwith” is not sufficient, though no steps are taken to eject the tenant for fourteen days after the notice.<sup>101</sup> But a notice to quit “within fourteen days from date,” if served more than fourteen days before bringing an action for possession, is good.<sup>102</sup>

The notice need not specify that it is in consequence of non-payment of rent due,<sup>103</sup> but if it does specify that it is given for that cause, it cannot subsequently be treated as a notice to terminate the tenancy.<sup>104</sup> An agreement to pay rent quarterly in advance does not dispense with the usual notice to terminate the tenancy;<sup>105</sup> and whether it would authorize a notice to quit in fourteen days, *quære*. Nor does a failure to pay rent in advance enable the landlord to eject the tenant without giving the statutory notice.<sup>106</sup> The fourteen days begin to run from the day of the receipt of the notice by the tenant.<sup>107</sup>

This notice entitles the landlord to maintain summary

<sup>99</sup> Bigelow, J., in *Granger v. Brown*, 11 Cush. 191.

<sup>100</sup> *Currier v. Barker*, 2 Gray, 224, 226.

<sup>101</sup> *Oakes v. Munroe*, 8 Cush. 282; *Sanford v. Harvey*, 11 Cush. 93. *Cp.* *Steward v. Harding*, 2 Gray, 335.

<sup>102</sup> *Johnson v. Stewart*, 11 Gray, 181.

“When an act is to be done within a given number of days from date or the date of a written instrument, the day of the date is to be excluded,” per Merrick, J., citing *Fuller v. Russell*, 6 Gray, 128; *Buttrick v. Holden*, 8 Cush. 233.

<sup>103</sup> *Granger v. Brown*, 11 Cush. 191. But a notice not fixing a day certain or giving the cause for the notice is bad. *Elliott v. Stone*, 12 Cush. 177, per Shaw, C. J., *Qu.* whether giving the cause only would be sufficient.

<sup>104</sup> *Tuttle v. Bean*, 13 Met. 275, 277.

<sup>105</sup> *Elliott v. Stone*, 12 Cush. 174.

<sup>106</sup> *Sprague v. Quinn*, 108 Mass. 553.

<sup>107</sup> *Hodgkins v. Price*, 137 Mass. 17; *May v. Rice*, 108 Mass. 150. *Cp.* § 162, *infra*.

process for the recovery of the property without making any demand for rent due.<sup>108</sup>

§ 162. Service of notices.<sup>108a</sup>—The principles as to service apply equally to notices to terminate a tenancy and those to quit for non-payment of rent. The statute provides that notices “in writing” shall be “given” by one party to the other, but is silent as to the precise mode of service. It has been decided that it is no objection to a notice that it was served more than the required time beforehand.<sup>109</sup>

It has been held, also, that a notice to quit and deliver up in a rental period “from the service thereof,” was not properly served by leaving it at the tenant’s house in his absence. It appeared the tenant did not return for some days but that his wife was at home and received the notice. The court said: “We think he was not bound on his return to inquire when it was left or if he did inquire to act upon the information that might have been given him. As the notice did not of itself apprise him of the day when the defendant required him to quit, it was defective and he lost none of his rights by disregarding it.”<sup>110</sup> Putting a notice through the window of the house in which the tenant sleeps at night but which is not at the time occupied by his family, and calling the attention of a relative of the tenant to the matter, such relative not being his servant or agent nor a member of his family, is not good service.<sup>111</sup> But leaving the notice on the demised premises with an agent or partner of the tenant,<sup>112</sup> or with the tenant’s wife, the tenant, though absent at the time, being

<sup>108</sup> *Kimball v. Rowland*, 6 Gray, 224. “Neglect” to pay means “the failure to pay money which the party is bound to pay without demand,” where the statute dispenses with any demand. Per Shaw, C. J. See *Murray v. Riley*, 140 Mass. 490. See also *infra*, § 302.

<sup>108a</sup> As to an acceptance of a surrender, dispensing with notice, see *supra*, § 160.

<sup>109</sup> *Johnson v. Stewart*, 11 Gray, 181, 183. In this case, the notice was to quit within fourteen days from its date. Suit was not brought until more than fourteen days from date of notice and held notice was sufficient.

The text is sustained by *Mentzner v. Hudson Savings Bank*, 197 Mass. 325, 330. *Cp. supra*, §§ 160, 161, as to dates and expirations of notices.

<sup>110</sup> *Hultain v. Munigle*, 6 Allen, 220.

<sup>111</sup> *Hodgkins v. Price*, 137 Mass. 16.

<sup>112</sup> *Walker v. Sharpe*, 103 Mass. 154 (notice to terminate tenancy served on partner of tenant with whom tenant had left his business while he and his family were out of the state). *Steese v. Johnson*, 168 Mass. 17 (servant).

in the town and living on the premises, is sufficient.<sup>113</sup> So, it is a good service if the notice be given to the tenant's wife or servant at the tenant's last and usual place of abode, that is, at his dwelling house, where this is not on the demised premises;<sup>114</sup> but merely leaving the notice at such last and usual place of abode is not sufficient.<sup>115</sup> In case the notice is thus left with the wife, the husband being out of town, a mistake in his Christian name is immaterial if she understands it is intended for him. "There was no uncertainty as to the party from whom it emanated or to the tenement to which it applied, and there could have been no doubt that it was meant for the family occupying that tenement. The mistake in the Christian name of the tenant was therefore of no importance; and as on account of his absence the notification could not be delivered to him personally, it was properly served by leaving it at his dwelling house in the hands of his wife."<sup>116</sup>

It has been held that service upon one of two tenants in common is service upon both, each being the agent of the other for such a purpose.<sup>117</sup> So, if there is an agent of either the landlord or the tenant who is authorized to receive notices, a notice addressed to him is sufficient, if in fact given to him as such agent and so received and understood by him.<sup>118</sup> But a notice given by one of several lessors who are tenants in common is operative only as to his share of the estate, in the absence of special authority from or ratification by the other owners.<sup>119</sup>

Actual receipt of the notice makes the period begin to run from the day of such receipt, whether the service was good or not;<sup>120</sup> but the notice must, of course, be in itself good in

<sup>113</sup> *Blish v. Harlow*, 15 Gray, 316; *Clark v. Kelliher*, 107 Mass. 406; *Steese v. Johnson*, 168 Mass. 17.

"Service of notice at the dwelling house of the party is sufficient, whether upon the party in person, or his wife, or servant." 2 Greenl. Evid., § 324.

<sup>114</sup> *Steese v. Johnson*, 168 Mass. 17.

<sup>115</sup> *Walker v. Sharpe*, 103 Mass. 154.

<sup>116</sup> Ames, J., in *Clark v. Kelleher*, 107 Mass. 406.

<sup>117</sup> *Grundy v. Martin*, 143 Mass. 279; 2 Greenl. Evid., § 324.

<sup>118</sup> *Bay State Bank v. Kiley*, 14 Gray, 492.

<sup>119</sup> *Doe v. Chaplin*, 3 Taunt. 120. *Cp.* as to a lease by one of several owners, *supra*, § 28.

<sup>120</sup> *Hodgkins v. Price*, 137 Mass. 17.

form.<sup>121</sup> Where a notice (to terminate tenancy) was sent by a messenger of the tenant, who found the landlord's door locked and bearing a notice requesting persons to leave notes in a box below, and the messenger put the letter in the box where the landlord found it next day, it was held that the notice took effect when actually received.<sup>122</sup>

It seems that the return of service by a sheriff or his deputy or a constable is *prima facie* evidence of service of a notice to terminate a tenancy or to quit for non-payment of rent.<sup>123</sup>

§ 163. Waiver of notices.—If the landlord accepts rent for a time subsequent to the expiration of the notice to quit, he waives the notice,<sup>124</sup> but not if he accepts such rent expressly reserving his rights;<sup>125</sup> for the money is his due, and he has a right to receive it without barring his right to terminate the tenancy at will, which is the direct object of the suit." And where a tenant does not comply with the notice, and the landlord is obliged to bring summary process to get him out, an action for use and occupation during a period subsequent to the expiration of the notice does not have the effect of waiving the notice.<sup>126</sup> If a tender of rent due is made on the same day, and at a time previous to that on which a notice to quit is given for non-payment of rent, of course the rent is not in arrears even if the money is declined.<sup>127</sup> It seems, also, that a notice to quit does not operate as a waiver of a prior notice to quit.<sup>128</sup> Shaw, C. J., has stated the principle in the following language: "Then it is contended that the subsequent notice to quit . . . admitted the defendant's possession, and amounted to a waiver of the former notice and entry. But we think this position cannot be supported. A party may admit the actual possession of another for the sake of a remedy, without admitting it to be lawful. It is not like the ac-

<sup>121</sup> See *Hultain v. Munigle*, 6 Allen, 220, cited *supra*.

<sup>122</sup> *May v. Rice*, 108 Mass. 150.

<sup>123</sup> G. L., c. 37, § 12; c. 41, § 94. See Crocker's Notes on Common Forms, 4th ed., 339.

<sup>124</sup> *Collins v. Canty*, 6 Cush. 415 (notice to terminate); *Kimball v. Rowland*, 6 Gray, 224 (notice to quit); *Dorrell v. Johnson*, 17 Pick. 263, 267, per Shaw, C. J.

<sup>125</sup> *Ibid.*, per Shaw, C. J., p. 226; *Miller v. Prescott*, 163 Mass. 12.

<sup>126</sup> *Blish v. Harlow*, 15 Gray, 316, 318.

<sup>127</sup> *Tuttle v. Bean*, 13 Met. 275, 277.

<sup>128</sup> *Dorrell v. Johnson*, 17 Pick. 263.

ceptance of rent for the land, after the time fixed by notice to quit, which admits that the party held as tenant and may amount to a tacit waiver of such notice.”<sup>129</sup>

The notice may be waived by what amounts to an express waiver; thus if, after notice, the parties agree for a further occupation without limiting the time, this will amount to a waiver of the notice; *aliter*, if such occupation is to be “for a short though indefinite period after the expiration of the time limited in the notice, with a view to the convenience of the [tenant] merely.”<sup>130</sup> But a negotiation for a written lease which never ripens into a contract is probably not a waiver by the landlord, where it appears that the occupation of the tenant after the time named in the notice to terminate was never spoken of, except in connection with the written lease.<sup>131</sup>

The party claiming a waiver must establish it.<sup>132</sup>

§ 164. Waiver of defects in notices.—If the party upon whom the notice is served, “knowing that the notice was intended to terminate the tenancy on that day, waived any objection to its informality, or by his words and conduct led the defendant reasonably and properly to understand that he waived such informality, he cannot now object that the notice was insufficient.”<sup>133</sup> Among the matters which may be considered by the jury on the question of waiver are, that on a notice by the tenant the landlord tried to induce him to stay by various offers; that the tenant sent the keys to the landlord on leaving; that the landlord never objected to the sufficiency of the notice.<sup>134</sup> If there is evidence that the tenant left because of the obstruction of light by the erection of a neighboring wall, evidence is admissible upon the question of waiver that at the time of the letting the landlord said there was no danger of such an obstruction.<sup>134a</sup> So where, after receiving from the tenant a notice to terminate the tenancy

<sup>129</sup> *Dorrell v. Johnson*, 17 Pick. 267.

<sup>130</sup> Instruction by Cushing, J., approved by Shaw, C. J., in *Babcock v. Albee*, 13 Met. 273; *Tuttle v. Bean*, 13 Met. 277.

<sup>131</sup> *Mentzner v. Hudson Savings Bank*, 197 Mass. 325.

<sup>132</sup> *Whitney v. Gordon*, 1 Cush. 266.

<sup>133</sup> *Morton, J.*, in *Boynton v. Bodwell*, 113 Mass. 531; *Whicher v. Cottrell*, 165 Mass. 351.

<sup>134</sup> *Boynton v. Bodwell*, 113 Mass. 531. *Cp. Means v. Cotton*, 225 Mass. 318.

<sup>134a</sup> *Boynton v. Bodwell*, *supra*.

which is insufficient, the landlord continues to try to collect his bills from the tenant, there is no evidence of waiver of notice or of defects in the notice on the part of the landlord, although the latter received money from a vendee of the tenant's business who is on the premises, which he credits to the tenant.<sup>135</sup>

Where a notice has not been served in season, a failure to object to it on this ground is not a waiver of the defect, though not urged until the trial.<sup>136</sup> Termination of tenancy and a waiver of notice may be shown under the general issue.<sup>137</sup>

§ 165. **Termination by other methods.**<sup>138</sup>—Where a letting is terminated by either of the following methods no notice to quit is necessary;<sup>139</sup> nor, where the tenant has vacated, is any notice to his licensee left behind necessary other than that the tenant's estate has been terminated.<sup>140</sup> But the tenant is allowed a reasonable time to remove, being, after his estate is determined, a mere tenant at sufferance.<sup>141</sup>

If the landlord has a right to terminate the tenancy, his motive for doing so is immaterial.<sup>141a</sup>

§ 166. **Agreed method.**—A tenancy may be terminated by the happening of a certain event agreed upon beforehand,

<sup>135</sup> *Whicher v. Cottrell*, 165 Mass. 351.

<sup>136</sup> *Bay State Bank v. Kiley*, 14 Gray, 492 (notice to terminate tenancy). The court seemed to lay some stress on the fact that it was too late to remedy the mistake or to give a new notice, and that therefore the other party could not have been prejudiced.

<sup>137</sup> *Boynton v. Bodwell*, 113 Mass. 531.

<sup>138</sup> See generally *Howard v. Merriam*, 5 Cush. 572.

<sup>139</sup> *Creech v. Crockett*, 5 Cush. 135; *Hollis v. Pool*, 3 Met. 350; *Hildreth v. Conant*, 10 Met. 298; *McFarland v. Chase*, 7 Gray, 462; *Lash v. Ames*, 171 Mass. 487.

"We are to keep steadily in view the distinction between determining the will as a means of determining the estate and the termination of the estate by other legal means. . . . May we not distinguish then, between the act of the party in determining his will, and thus directly determining the estate as of his own power which is limited and restricted by this statute [as to notice], and his act in alienating, being a lawful act done *alio intuitu* which he has a right to do and to which the law attaches a collateral consequence, to wit, the determination of the estate at will." Shaw, C. J., in *Howard v. Merriam*, 5 Cush. 572, 583.

<sup>140</sup> *Stone v. Lahey*, 133 Mass. 426.

<sup>141</sup> See *infra*, § 180.

<sup>141a</sup> *De Wolfe v. Roberts*, 229 Mass. 410; *Green v. Pearlstein*, 213 Mass. 360.



and this event may be the failure of the lessee to perform a certain condition agreed to.<sup>142</sup> It should be noticed, however, that a mere failure to pay rent or to perform services in lieu of rent, does not terminate the tenancy without notice;<sup>143</sup> nor an agreement to pay rent in advance,<sup>144</sup> unless it is expressly made a conditional limitation.<sup>145</sup>

So, it may be agreed that the tenancy shall be terminated by a notice different from that required by statute;<sup>146</sup> as, for example, that either party may terminate the tenancy by giving a month's notice, and in that case the notice may be given at any time.<sup>147</sup> It may be specially agreed between the parties that no notice whatever shall be required.<sup>148</sup> In one case,<sup>149</sup> a request for a ruling that, if the contract was that the tenant might leave whenever he pleased, no notice of intention to quit was necessary, was refused; but this decision was upon the ground that the contract simply established a tenancy at will and contained no stipulation as to the method of terminating it.<sup>150</sup> The general principle has been stated thus: "A tenancy at will may be terminated at any time and in any manner which may be mutually agreed upon by the parties. A landlord may waive the notice to which he is entitled under the provision of the statute and consent that his tenant may quit and deliver up the premises at his pleasure. If the tenant avails himself of this consent and relinquishes the possession and all right of possession of the estate, and gives notice thereof to the landlord he will thereby terminate the

<sup>142</sup> *Creech v. Crockett*, 5 Cush. 135 (condition that premises were to be used for a barber's shop); *Hollis v. Pool*, 3 Met. 350 (sale of the property); *Lyon v. Cunningham*, 136 Mass. 541; *Ashley v. Warner*, 11 Gray, 43 (conditional limitation "as long as tenant keeps a good school"); *Elliott v. Stone*, 1 Gray, 571 (failure to pay rent in advance where an agreement that tenant should leave on such failure).

<sup>143</sup> *Gleason v. Gleason*, 8 Cush. 32.

<sup>144</sup> *Sprague v. Quinn*, 108 Mass. 554; *Elliott v. Stone*, 12 Cush. 174; *Bartlett v. Greenleaf*, 11 Gray, 98.

<sup>145</sup> *Elliott v. Stone*, 1 Gray, 571.

<sup>146</sup> *May v. Rice*, 108 Mass. 150; *Farson v. Goodale*, 8 Allen, 202.

<sup>147</sup> *May v. Rice*, 108 Mass. 150.

<sup>148</sup> *Davis v. Murphy*, 126 Mass. 143 ("liberty to leave the premises at pleasure and at a moment's notice"); *Farson v. Goodale*, 8 Allen, 202 (notice waived).

<sup>149</sup> *Batchelder v. Batchelder*, 2 Allen, 105.

<sup>150</sup> *Davis v. Murphy*, 126 Mass. 143.



lease and be liable for no further rent.”<sup>151</sup> So, it may be agreed that the tenancy shall terminate at a given time; or that a new person shall be substituted as tenant, which amounts to a surrender accepted by the landlord.<sup>152</sup> But the mere fact that the landlord receives money from a third person on the premises which he credits the tenant with, does not justify such a finding of fact.<sup>153</sup>

§ 167. **Assignment by the tenant.**—An assignment of his estate by a tenant at will terminates the tenancy without notice.<sup>154</sup> But the taking a partner by a tenant and admitting him to joint occupation with himself does not amount to an assignment of the tenant’s interest or affect his right in the premises.<sup>155</sup> “The relation of such a tenant [at will] to his landlord is merely personal, and a formal transfer by him gives no rights to the assignee, and the owner of the premises may treat the assignee as a trespasser,<sup>156</sup> or he may maintain the statutory process to recover possession.”<sup>157</sup>

The bankruptcy of the tenant may amount to such an assignment as will terminate the tenancy.<sup>158</sup>

§ 168. **Death.**—The death of either landlord or tenant in a tenancy at will is *de facto* a termination of the estate.<sup>159</sup>

§ 169. **Disclaimer.**—An express disclaimer of the tenancy by a tenant at will, or the doing of acts inconsistent with such tenancy, is a termination thereof. See *supra*, §§ 120, 159.

<sup>151</sup> Merrick, J., in *Farson v. Goodale*, 8 Allen, 202.

<sup>152</sup> *King v. Lawson*, 98 Mass. 309.

<sup>153</sup> *Whicher v. Cottrell*, 165 Mass. 351.

It is open to the landlord to show that he acted as agent for the lessee in collecting rent, and continued to trust the lessee as tenant. *Cooley v. Collins*, 186 Mass. 507.

<sup>154</sup> Co. Lit. 57; *Cooper v. Adams*, 6 Cush. 91; *King v. Lawson*, 98 Mass. 309; *Clark v. Wheelock*, 99 Mass. 14; *Borden v. Sackett*, 113 Mass. 214, 216; *Coughlin v. Gray*, 131 Mass. 56; *Hart v. Bouton*, 152 Mass. 440. See *Brewer v. Dyer*, 7 Cush. 337.

<sup>155</sup> *Walker v. Sharpe*, 103 Mass. 154.

<sup>156</sup> *Hart v. Bouton*, 152 Mass. 440, per C. Allen, J.; *Coughlin v. Gray*, 131 Mass. 56; *King v. Lawson*, 98 Mass. 309.

<sup>157</sup> *Hart v. Bouton*, 152 Mass. 440; *King v. Lawson*, 98 Mass. 309; *Clark v. Wheelock*, 99 Mass. 14.

<sup>158</sup> *Bray v. Cobb*, 100 Fed. Rep. 270.

<sup>159</sup> *Ferrin v. Kenney*, 10 Met. 294; *Howard v. Merriam*, 5 Cush. 579; *Rising v. Stannard*, 17 Mass. 283; *Theological Institute v. Barbour*, 4 Gray, 329; *Ellis v. Paige*, 1 Pick. 43, 47.

§ 170. **Eminent domain.**—A taking of land by eminent domain, if only an easement is taken, and the tenant is not evicted from any part of the land, does not determine a tenancy at will; <sup>160</sup> *aliter*, if the whole land be taken.<sup>161</sup>

§ 171. **Expiration of time limited.**—When a parol lease is made for a certain definite time, the lessee has no right to hold beyond the expiration of that time, and is not entitled to notice to quit.<sup>162</sup> The rule is the same as to written leases.<sup>163</sup>

§ 172. **Failure of lessor's title.**—The recovery of a judgment for possession against the lessee of premises puts an end to the estate of a tenant at will of such lessee.<sup>164</sup>

§ 173. **Illegal use.**—As to the effect of illegal use of the premises upon a tenancy at will, see *supra*, §§ 128–132.

§ 174. **Lease by landlord.**—Similarly, a lease by the landlord terminates the tenancy at will;<sup>165</sup> and the lessee, after

<sup>160</sup> *Emmes v. Feeley*, 132 Mass. 346; *Devine v. Lord*, 175 Mass. 384, 390 (widening of street by city). *Cp. supra*, § 138.

<sup>161</sup> *O'Brien v. Ball*, 119 Mass. 28.

<sup>162</sup> *Creech v. Crockett*, 5 Cush. 133, 136; *Elliott v. Stone*, 1 Gray, 571; *Dorrell v. Johnson*, 17 Pick. 266. *Cp. Elliott v. Stone*, 12 Cush. 174.

"If there is a parol lease, and the lessee takes the premises for a certain term or to determine upon a condition, the lessee is bound to quit at the time limited or on the happening of the condition; and in either of these cases if he holds over he holds without right." Shaw, C. J., in *Howard v. Merriam*, 5 Cush. 583.

<sup>163</sup> See *supra*, § 149.

<sup>164</sup> *Hatstat v. Packard*, 7 Cush. 245. See *King v. Lawson*, 98 Mass. 309; *Evans v. Reed*, 5 Gray, 308; *Hollis v. Pool*, 3 Met. 350; *Coburn v. Palmer*, 8 Cush. 124; *Marsters v. Cling*, 163 Mass. 477.

<sup>165</sup> *Hildreth v. Conant*, 10 Met. 302; *Kelly v. Waite*, 12 Met. 300; *Pratt v. Farrar*, 10 Allen, 519; *Mizner v. Munroe*, 10 Gray, 290; *Platt v. Grover*, 136 Mass. 115; *Twombly v. Monroe*, 136 Mass. 464; *Hooton v. Holt*, 139 Mass. 54; *Clark v. Wheelock*, 99 Mass. 14; *Groustra v. Bourges*, 141 Mass. 7; *Wardell v. Etter*, 143 Mass. 19; *Weiss v. Levy*, 166 Mass. 290; *Furlong v. Leary*, 8 Cush. 409; *Dillon v. Brown*, 11 Gray, 179; *Casey v. King*, 98 Mass. 503; *McGonigle v. Belleisle Co.*, 186 Mass. 310; *Mentzner v. Hudson Savings Bank*, 197 Mass. 325; *Gloyd v. Davis*, 214 Mass. 238.

*Historical.* Prior to St. 1885, c. 237, a conveyance of land to husband and wife conveyed an estate of which the husband could make a lease good against the wife during coverture. Such a lease therefore would determine a tenancy at will or a license under her. *Pray v. Stebbins*, 141 Mass. 219.

See also *McLaughlin v. Rice*, 185 Mass. 212; *Pease v. Whitman*, 182 Mass. 363.

receiving the lease and giving notice to the former tenant, may take possession and eject the tenant, using such force as is reasonably necessary.<sup>166</sup> The motive of the owner in making the lease is immaterial;<sup>167</sup> and an action of tort for conspiracy will not lie against the landlord and the lessee for the leasing.<sup>167a</sup> In such a case, questions as to whether the lessor intended the lessee or another to actually occupy are incompetent and immaterial.<sup>168</sup>

It has been held that a provision in a lease that no rent should be claimed until the lessee was in actual possession does not operate to suspend the lease and prevent the determination of a tenancy at will.<sup>169</sup>

If the tenant at will has actual notice of such alienation, the new grantee or lessee need not notify him of the fact,<sup>170</sup> otherwise the tenant's estate is not completely terminated and he is not subject to summary process by the new party until notified of the deed or lease;<sup>171</sup> but if the grantee or lessee names a certain day on or before which the tenant must remove, he cannot begin any action to get the tenant out until the expiration of such day.<sup>172</sup> Notice to an assignee of the tenant at will is notice to the tenant where he has surrendered all his interest to such assignee.<sup>173</sup> The notice need not be given by both grantor and grantee, or lessor and lessee, and need not be in writing; nor need it state that the lease was

<sup>166</sup> *Curtis v. Galvin*, 1 Allen, 215; *Twombly v. Monroe*, 136 Mass. 464. See *Meader v. Stone*, 7 Met. 147; *Low v. Elwell*, 121 Mass. 309.

<sup>167</sup> *Green v. Pearlstein*, 213 Mass. 360, 362; *De Wolfe v. Roberts*, 229 Mass. 410. *Cp. infra*, § 278. The fact that after the giving of the lease which provided the lessee should pay the water rates, receipts for the water rates were given in the name of the owner is likewise immaterial. *Green v. Pearlstein*, 213 Mass. 360.

<sup>167a</sup> *De Wolfe v. Roberts*, 229 Mass. 410.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Pratt v. Farrar*, 10 Allen, 519, 521.

<sup>170</sup> *McFarland v. Chase*, 7 Gray, 462.

<sup>171</sup> *Furlong v. Leary*, 8 Cush. 409; *Pratt v. Farrar*, 10 Allen, 519; *Lash v. Ames*, 171 Mass. 487. *Cp. Mentzner v. Hudson Savings Bank*, 197 Mass. 325.

<sup>172</sup> *Decker v. McManus*, 101 Mass. 63. *Qu.* whether such notice could be revoked and one giving a less time substituted, or whether a refusal by the tenant to move at all and a denial of the plaintiff's right would justify beginning proceedings before the expiration of such notice. *Ibid.*

<sup>173</sup> *Clark v. Wheelock*, 99 Mass. 14.

in writing;<sup>174</sup> nor, if the notice is signed by the attorney of the lessee, need the tenant know as to his authority to act as such attorney.<sup>175</sup>

As in the case of sale, a lease by one of two tenants in common, subsequently assented to by the other, terminates a tenancy subsisting at the date of the lease;<sup>176</sup> *aliter*, where such lease is not assented to, as the tenant still holds the remaining undivided interest.<sup>177</sup> Where the person purporting to give a lease is himself only a tenant at will, the lessee gets no title to possession as against a prior subtenant at will of his lessor.<sup>178</sup>

The burden is on a tenant at will who denies that this landlord's written lease to another terminates his estate, to prove that such lease conveys either no estate at all or one not greater than an estate at will.<sup>179</sup>

§ 175. Partition.—A partition of the leased premises puts an end to a tenancy at will of the premises, whether such tenancy was at the will of all the tenants in common of the land or of some of them.<sup>180</sup>

§ 176. Sale by landlord.—A conveyance in fee by the landlord terminates a tenancy at will,<sup>181</sup> and the tenant at

<sup>174</sup> *Mizner v. Munroe*, 10 Gray, 290 (notice by both); *Howard v. Merriam*, 5 Cush. 563, 564 (notice by grantee).

<sup>175</sup> *Mizner v. Munroe*, 10 Gray, 290.

<sup>176</sup> *Cofran v. Shepard*, 148 Mass. 582.

<sup>177</sup> *Dillon v. Brown*, 11 Gray, 179. *Cp. supra*, § 28.

<sup>178</sup> *Hilbourn v. Fogg*, 99 Mass. 11; *Palmer v. Bowker*, 106 Mass. 317. *Cp. Assignment, supra*, § 167.

<sup>179</sup> *Streeter v. Ilsley*, 147 Mass. 141. See also *infra*, §§ 205–208.

<sup>180</sup> *Rising v. Stannard*, 17 Mass. 286.

<sup>181</sup> *Benedict v. Morse*, 10 Met. 223; *Howard v. Merriam*, 5 Cush. 572, 574; *Curtis v. Galvin*, 1 Allen, 215; *Rooney v. Gillespie*, 6 Allen, 74; *Theological Institute v. Barbour*, 4 Gray, 330; *Winter v. Stevens*, 9 Allen, 526, 530; *Emerson v. Somerville*, 166 Mass. 115, 118; *Hammond v. Thompson*, 168 Mass. 531; *Lash v. Ames*, 171 Mass. 487; *Jones v. Donnelly*, 221 Mass. 213 (license); *Gavin v. Durden Coleman Lumber Co.*, 229 Mass. 576.

So, a conveyance of the whole estate by a partnership of three to a new firm of four operates to terminate a tenancy at will. *McFarland v. Chase*, 7 Gray, 462.

"It is an intrinsic quality in an estate at will that it is personal, and cannot pass to an assignee; and that by alienation in fee or for years the estate is, *ipso facto*, determined and cannot subsist longer. This is a limitation of the estate which is incident to its very nature; when there-

will cannot inquire into the validity of the consideration of the deed.<sup>182</sup> The fact that, before giving the deed to the third person, the owner gave a bond for a deed to the tenant at will, does not prevent the estate of the tenant terminating upon such conveyance.<sup>183</sup>

The conveyance of only a portion of the estate demised will determine a tenancy at will of the whole.<sup>184</sup> On the other hand, where the part conveyed is an undivided interest in the whole estate, as where one partner alone executes an instrument in the name of the firm, thus passing only his own interest, a tenant at will continues tenant of the other undivided portion;<sup>185</sup> but a subsequent assent to such a lease by the other tenants in common terminates the tenancy at will entirely.<sup>186</sup>

In case of a sale by his landlord, the tenant becomes at once a tenant at sufferance, and is liable to the grantee without any notice to quit in an action by summary process;<sup>187</sup> and the occupation of the tenant at will is not such a disseisin or adverse occupation as requires an actual entry by the owner to make a valid lease or conveyance.<sup>188</sup> But the tenant is not liable to pay rent under the statute unless he had notice or knowledge of the transfer.<sup>189</sup> A sale upon execution has the same effect as a voluntary conveyance.<sup>190</sup>

Where the tenancy at will is terminated by a conveyance fore it is determined by operation of law, it is determined by its own limitation without notice." Shaw, C. J., in *Howard v. Merriam*, 5 Cush. 583.

<sup>182</sup> *Curtis v. Galvin*, 1 Allen, 215.

<sup>183</sup> *Rooney v. Gillespie*, 6 Allen, 74.

<sup>184</sup> *Emmes v. Feeley*, 132 Mass. 346, "because there has never been any agreement, express or implied, on the part of the plaintiff to let, and on the part of the defendant to hire, that portion of the land," per Field, J.

<sup>185</sup> *Dillon v. Brown*, 11 Gray, 179. This must proceed on the theory that each partner is lessor of his own portion of the estate. *Cp. supra*, § 31.

<sup>186</sup> *Cofran v. Shepard*, 148 Mass. 582. *Cp. McFarland v. Chase*, 7 Gray, 462.

<sup>187</sup> *Benedict v. Morse*, 10 Met. 223; *Kinsley v. Ames*, 2 Met. 29; *Hollis v. Pool*, 3 Met. 350; *Howard v. Merriam*, 5 Cush. 563; *McFarland v. Chase*, 7 Gray, 463; *Moore v. Mason*, 1 Allen, 407; *Marsters v. Cling*, 163 Mass. 477; *Weiss v. Levy*, 166 Mass. 290; *Lash v. Ames*, 171 Mass. 487.

<sup>188</sup> *Alexander v. Carew*, 13 Allen, 72. *Cp. G. L.*, c. 183, § 7.

<sup>189</sup> *Dixon v. Smith*, 181 Mass. 218; *Gavin v. Durden Coleman Lumber Co.*, 229 Mass. 576. See *infra*, § 184.

<sup>190</sup> *Marsters v. Cling*, 163 Mass. 477.

between two rent days, the landlord is not entitled to recover for use and occupation from the last rent day to the date of the conveyance, the rent not being apportionable; even although there has been no eviction by the grantee and no attornment to him.<sup>191</sup>

§ 177. Surrender.—For the subject of surrender see, generally, *supra*, §§ 134, 135.

In one case, a tenant at will gave an insufficient notice to terminate tenancy, and the landlord stated he should require a proper notice; the tenant paid his rent on the next rent day (Nov. 1) and sent the keys to the landlord who three days later wrote that the keys were not accepted as a surrender but that the tenant would continue to be held for the rent, although the landlord would let the premises if possible and would use the keys for the purpose; the next day the landlord found the premises damaged by acts of omission on the part of the tenant, and repaired the damage and also made other repairs; in December the landlord let part of the premises, the new tenant occupying Dec. 26, the rent to be paid beginning Jan. 1. It was held that on these facts it could be found that the landlord had accepted a surrender in effect Dec. 1.<sup>192</sup>

If a tenant at will surrenders his estate by express agreement with the landlord and vacates the premises, his licensee left behind is not entitled to any statutory notice to quit.<sup>193</sup> But the mere receipt of money from a third person which the landlord credits the tenant with is not evidence of a surrender accepted by the landlord;<sup>194</sup> nor is the leaving of the keys of the premises with the landlord, if the latter refuses to accept them and tells the tenant he shall hold him for rent.<sup>195</sup>

Where a surrender is compelled through the use of criminal

<sup>191</sup> *Emmes v. Feeley*, 132 Mass. 346; *Fuller v. Swett*, 6 Allen, 219, n.; *O'Brien v. Ball*, 119 Mass. 28; *Hammond v. Thompson*, 168 Mass. 531; *Gavin v. Durden Coleman Lumber Co.*, 229 Mass. 576. *Cp. Dexter v. Phillips*, 121 Mass. 178.

<sup>192</sup> *Means v. Cotton*, 225 Mass. 313.

<sup>193</sup> "She [the licensee] was entitled to no other notice to quit than one that should inform her that the person by whose authority she was originally there had surrendered possession and that the defendant desired her to leave. Upon her refusal to comply with this request he was justified in ejecting her, using no unreasonable force." Devens, J., in *Stone v. Lahey*, 133 Mass. 426, citing *Low v. Elwell*, 121 Mass. 309. *Cp. supra*, § 134.

<sup>194</sup> *Whicher v. Cottrell*, 165 Mass. 351.

<sup>195</sup> *Taylor v. Tuson*, 172 Mass. 145.

proceedings by a landlord, without foundation, the latter is liable in tort for abuse of legal process.<sup>196</sup>

§ 178. Waste.—If the tenant at will commits voluntary waste it is a determination of the will and an act of trespass, so that an action of tort in the nature of trespass *quare clausum* will lie by the reversioner.<sup>197</sup> So a tenant at will who attempts to authorize, without the owner's consent, a board of health to use the premises as a hospital for contagious diseases is apparently made a trespasser thereby.<sup>198</sup>

<sup>196</sup> *White v. Apsley Rubber Co.*, 194 Mass. 97.

<sup>197</sup> *Daniels v. Pond*, 21 Pick. 367; *Starr v. Jackson*, 11 Mass. 519; *Lienow v. Ritchie*, 8 Pick. 235; *Chalmers v. Smith*, 152 Mass. 561; *United States v. Bostwick*, 94 U. S. 53, 66. *Cp.* *Lothrop v. Thayer*, 138 Mass. 466, 473, and *infra*, §§ 202-204, 274-276, 278.

<sup>198</sup> *Hersey v. Chapin*, 162 Mass. 176.

## CHAPTER IV

### TENANCY AT SUFFERANCE

§ 179. **Definition.**—A tenant at sufferance is he who comes into possession by a lawful demise, but after his term is ended continues the possession wrongfully by holding over. He has only a naked possession and stands in no privity to the landlord.<sup>1</sup> One who continues to occupy as tenant with the knowledge and consent of the owner cannot be a tenant at sufferance.<sup>2</sup>

Tenancy at sufferance may be created where a tenancy at will is terminated lawfully, whether by notice or by the happening of an event agreed upon,<sup>3</sup> or where an oral lease or license expires by its own termination.<sup>4</sup> But one who has notice of the termination of his estate at will and sufficient time to remove from the premises but who enters again is a

<sup>1</sup> Bouvier Law Dict.; *Kelly v. Waite*, 12 Met. 300; *Pratt v. Farrar*, 10 Allen, 519; *Mayo v. Fletcher*, 14 Pick. 525, 531; *Benton v. Williams*, 202 Mass. 189, 192.

<sup>2</sup> *Johnson v. Carter*, 16 Mass. 443.

<sup>3</sup> *Hollis v. Pool*, 3 Met. 350 (holding over where there was an agreement to quit when property sold, and the property was sold); *Meador v. Stone*, 7 Met. 147 (notice to quit for non-payment of rent); *Benedict v. Morse*, 10 Met. 223 (sale of premises by landlord); *Hildreth v. Conant*, 10 Met. 298; *Kelly v. Waite*, 12 Met. 300 (lease by landlord); *Howard v. Merriam*, 5 Cush. 563 (sale by landlord, review of previous cases); *Hatstat v. Packard*, 7 Cush. 245 (ouster of licensee by paramount title); *Pratt v. Farrar*, 10 Allen, 521 (lease by landlord); *Low v. Elwell*, 121 Mass. 309 (same); *Emmes v. Feeley*, 132 Mass. 346; *Devine v. Lord*, 175 Mass. 384, 390 (taking of portion of premises by eminent domain); *Groustra v. Bourges*, 141 Mass. 7 (lease by landlord); *McGonigle v. Belleisle Co.*, 186 Mass. 310 (same); *Swift v. Boyd*, 202 Mass. 26 (lease by landlord making owner of a building on the land a tenant at sufferance as to the building, which was treated as the personal property of the tenant); *Gavin v. Darden Coleman Lumber Co.*, 229 Mass. 576 (sale by landlord); *Pierce v. Kolikof*, 232 Mass. 479 (lease).

<sup>4</sup> *Dorrell v. Johnson*, 17 Pick. 263; *Creech v. Crockett*, 5 Cush. 135; *Mason v. Holt*, 1 Allen, 45.



trespasser.<sup>5</sup> So one who holds over after the expiration of a written lease is a tenant at sufferance,<sup>6</sup> and this is not altered by a clause in the lease that the tenant shall pay quarterly after the expiration of the term "for such further term as the lessees or any other person or persons claiming under them shall hold the premises or any part thereof."<sup>7</sup>

So, when a fraudulent grantor makes a written lease, and is then dispossessed by the trustee in bankruptcy of the grantor, the lessee becomes the tenant at sufferance of the trustee.<sup>8</sup>

If a mortgagor or one under him is allowed by the terms of the mortgage to remain in possession, and after the expiration of the period for which the mortgage is given he holds over, the mortgage debt being unpaid, he becomes a tenant at sufferance.<sup>9</sup> Similarly, when the mortgagee or his assigns sells the premises pursuant to a power of sale in the mortgage deed, the mortgagor in possession, after entry by the mortgagee or the purchaser, is a tenant at sufferance.<sup>10</sup> But where the mortgagor has reserved no right of possession and, in general, where one who has occupied the premises with another, the right of possession being in that other, holds over, he is not a tenant at sufferance but a mere trespasser. He may be expelled like all other trespassers, and summary process will not lie against him, as this presupposes a privity between the parties.<sup>11</sup>

An undertenant, after the termination of his landlord's tenancy, becomes a tenant at sufferance to the original lessor.<sup>12</sup>

<sup>5</sup> *Kelly v. Waite*, 12 Met. 300.

<sup>6</sup> *Delano v. Montague*, 4 Cush. 42; *Edwards v. Hale*, 9 Allen, 462; *Warren v. Lyons*, 152 Mass. 310; *Benton v. Williams*, 202 Mass. 189, 192; *Pierce v. Kolikof*, 232 Mass. 479.

<sup>7</sup> *Edwards v. Hale*, 9 Allen, 462; *Benton v. Williams*, 202 Mass. 189, 192. *Cp. Salisbury v. Hale*, 12 Pick. 422. "The effect of the covenant is to fix the amount of rent which the tenant shall pay for his holding over." *Edwards v. Hale*, *supra*.

<sup>8</sup> *Gray v. Chase*, 184 Mass. 444.

<sup>9</sup> *Mayo v. Fletcher*, 14 Pick. 525, 532.

<sup>10</sup> *Kinsley v. Ames*, 2 Met. 29. See notes on this case in *Howard v. Merriam*, 5 Cush. 563 and *Woodside v. Ridgeway*, 126 Mass. 292. See also *Wilder v. Houghton*, 1 Pick. 87; *Gibson v. Farley*, 16 Mass. 280.

There must have been such entry to create the tenancy at sufferance. *Woodside v. Ridgeway*, 126 Mass. 292, 294.

<sup>11</sup> *Whitney v. Dart*, 117 Mass. 153.

<sup>12</sup> *Evans v. Reed*, 5 Gray, 309.

As to when a tenant at sufferance holding over becomes a tenant at will, see, *supra*, § 154.

When the landlord terminates a lease, and a subtenant attorns to him, and the landlord leases to another who notifies the former subtenant to quit, but later permits him to remain for a time, the former subtenant is liable to the second lessee even though the first lease was never legally terminated, and though the second lessee never told the former subtenant that he would be required to pay rent.<sup>13</sup>

§ 180. Recovery of possession from tenant.—Time for removal.—A tenant at sufferance is not entitled to any regular notice to quit,<sup>14</sup> but he is entitled to a reasonable time to remove himself, his family and goods, and to remain or enter for that purpose without being deemed a trespasser.<sup>15</sup>

What is a reasonable time is a question of law.<sup>16</sup> It has

<sup>13</sup> *Pierce v. Kolikof*, 232 Mass. 479.

<sup>14</sup> *Hildreth v. Conant*, 10 Met. 301; *Kinsley v. Ames*, 2 Met. 29; *Howard v. Merriam*, 5 Cush. 571; *Evans v. Reed*, 5 Gray, 309; *Lash v. Ames*, 171 Mass. 487; *Benton v. Williams*, 202 Mass. 189, 192.

"The first exception is to the admission of the notice in evidence. As the defendant appears to have been a tenant at sufferance, no particular form of notice was required, and a notice calling for immediate possession would be sufficient. If an action is brought without allowing time enough to remove that does not show that the notice to quit is incompetent in evidence, but is a matter to be shown in defence." C. Allen, J., in *Hooton v. Holt*, 139 Mass. 54.

*Historical.* St. 1825, c. 89, § 4, was repealed by Rev. St., c. 60, § 26, for the purpose of making a difference between tenants at will and tenants at sufferance in respect to notice. See notes of Com'rs in relation to the two estates. *Benedict v. Morse*, 10 Met. 223; *Hildreth v. Conant*, 10 Met. 301. Formerly, under that statute, tenants at sufferance were entitled to notice. *Kelly v. Waite*, 12 Met. 300. See also *Howard v. Merriam*, 5 Cush. 565; *Sacket v. Wheaton*, 17 Pick. 103.

<sup>15</sup> *Pratt v. Farrar*, 10 Allen, 521; *Rising v. Stannard*, 17 Mass. 282, 287; *Curl v. Lowell*, 19 Pick. 27; *Doe v. McKeog*, 10 B. & C. 723, 724; *Clark v. Keliher*, 107 Mass. 406; *Arnold v. Nash*, 126 Mass. 397; *Groustra v. Bourges*, 141 Mass. 7; *Antoni v. Belknap*, 102 Mass. 193; *Wardell v. Etter*, 143 Mass. 19; *Decker v. McManus*, 101 Mass. 63; *Grundy v. Martin*, 143 Mass. 279; *Clark v. Wheelock*, 99 Mass. 14; *Mann v. Hughes*, 20 Law Reporter, 628 (Mass. Sup'r Court); *Lash v. Ames*, 171 Mass. 487.

A notice served upon one of two tenants in common is a sufficient notice to both tenants. *Grundy v. Martin*, 143 Mass. 279.

<sup>16</sup> *Ellis v. Paige*, 1 Pick. 50; s. c., 2 Pick. 71n.; *Pratt v. Farrar*, 10 Allen, 521; *Arnold v. Nash*, 126 Mass. 397; *Lash v. Ames*, 171 Mass. 487.

been held that five hours of daylight was clearly more than a reasonable time to remove an attorney's desk and law books of not more than two hundred dollars in value.<sup>17</sup> In another case a notice to deliver up the premises was given nearly 48 hours before the action was brought. "The tenement was the lower story of a house in the city of Springfield. It does not appear that the defendant's wife's health was so feeble that she could not assist in removing, or that his child was too sick to be removed; and it does not appear that their state of health was unknown [known?] to the plaintiff until after he had brought this suit." The notice was held sufficient.<sup>18</sup> A notice of two days may be sufficient.<sup>19</sup> Three days was held to be a reasonable time in the case of a married woman conducting a manufacturing business with her husband as her agent.<sup>20</sup> So, in the case of a married man occupying a tenement in the second story of a building a notice was held to be sufficient, which was dated July 3, and served between six and seven o'clock on the evening of that day and which notified the tenant to vacate by Monday, July 6, at noon.<sup>21</sup> Four days' notice has been held sufficient,<sup>22</sup> and twelve days more than sufficient.<sup>23</sup> In another case, the tenant occupied two months in removing 2000 tons of ice from an ice house. It appeared that the ice would have been of no value if removed at once to another place, and there was no evidence that the tenant could have removed it faster than he did. It was held that the two months was a reasonable time.<sup>24</sup> Four months has been held to be a reasonable time in which to remove a stock of goods.<sup>25</sup>

Where a tenant at will has been made a tenant at sufferance, as by a lease of the premises, and the lessee names in his notice a certain day on or before which the tenant must quit, such length of time is taken in the absence of objection by the

<sup>17</sup> *Williams v. Powell*, 101 Mass. 467.

<sup>18</sup> *Pratt v. Farrar*, 10 Allen, 519, 521.

<sup>19</sup> *Hooton v. Holt*, 139 Mass. 54; *Arnold v. Nash*, 126 Mass. 397 (case of a grocery store).

<sup>20</sup> *Hart v. Bouton*, 152 Mass. 440.

<sup>21</sup> *Wardell v. Etter*, 143 Mass. 19.

<sup>22</sup> *Grundy v. Martin*, 143 Mass. 279.

<sup>23</sup> *Clark v. Wheelock*, 99 Mass. 14.

<sup>24</sup> *Antoni v. Belknap*, 102 Mass. 193.

<sup>25</sup> *Lash v. Ames*, 171 Mass. 487.

tenant to be a reasonable time, and the lessee cannot begin proceedings to get the tenant out until the day named has expired.<sup>26</sup> "While the notice to the tenant, of the termination of the tenancy, would not be allowed to abbreviate by its terms that reasonable time which the law allows, yet, when the party entitled to possession voluntarily names the time within which he requires the tenant to remove, there would be great injustice in allowing him to disregard it and put a party to cost who is without fault. It is not necessary to decide what effect, if any, a revocation by the plaintiff of the time given in the notice, before its expiration, or an express denial of the plaintiff's right by the tenant and a refusal to remove, would have had upon the result we come to."<sup>27</sup> Conversation between the landlord and an agent of the tenant, as to when the latter should leave, are competent.<sup>27a</sup> The landlord is entitled to the possession of buildings upon the land free from the tenant's goods and effects; and if the tenant, after the lapse of a reasonable time, neglects to remove them the landlord may remove them himself; and if the tenant then refuses to indicate what shall be done with them, the landlord may store them subject to the tenant's orders.<sup>28</sup>

A notice calling for immediate possession is sufficient, and insufficiency of time is a matter to be shown in defence<sup>29</sup> to an action by the landlord. Whether the same rule applies in the case of an action by the tenant against the landlord, *quære*.<sup>30</sup>

§ 181. Entry by landlord.—After notice to quit, the landlord may either bring summary process to recover possession,<sup>31</sup> or may enter by force and expel the tenant. "Where a party is wrongfully holding possession of land, and the party having the right enters, either declaring his purpose to be to regain possession, or doing acts of ownership, expressive of his in-

<sup>26</sup> Decker v. McManus, 101 Mass. 63.

<sup>27</sup> *Ibid.*, per Holt, J.

<sup>27a</sup> Lash v. Ames, 171 Mass. 487, 491.

<sup>28</sup> Lash v. Ames, 171 Mass. 487. Cf. Shea v. Milford, 145 Mass. 525 (case of goods of a licensee).

<sup>29</sup> Hooton v. Holt, 139 Mass. 54; Lash v. Ames, 171 Mass. 487. Cf. *infra*, § 303.

<sup>30</sup> Lash v. Ames, 171 Mass. 487, 491.

<sup>31</sup> See *infra*, §§ 302-312.

tent to hold as owner, this is sufficient. In a late case it was held by Lord Tenterden, that it is not necessary that the party entering should declare that he enters to take possession; It is sufficient if he does any act to show his intention. In that case his servants ploughed the land, from which it was manifest that he intended to take possession. In the present case it is shown by a witness who was the agent of the plaintiff, that he went on the land and cut trees for the plaintiff, after the expiration of the term. We think this is sufficient to show that the plaintiff regained the lawful possession of the estate." <sup>32</sup>

The landlord may use such a degree of force as is reasonable and necessary to effect his entry.<sup>33</sup> "If the landlord forcibly enters and expels him [the tenant] the landlord may be indicted for the forcible entry. But he is not liable to an action of tort for damages either for his entry upon the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary. The tenant cannot maintain an action in the nature of *quare clausum fregit*, because the title and the lawful right to the possession are in the landlord, and the tenant as against him has no right of occupation whatever. He cannot maintain an action in the nature of trespass to his person for a subsequent expulsion with no more force than necessary to accomplish the purpose; because the landlord having obtained possession by an act which, though subject to be punished by the public as a breach of the peace is not one of which the tenant has any right to complain, has, as against the tenant, the right of possession of the premises; and the landlord, not being liable to the tenant in an action of tort for the principal act of entry upon the land cannot be liable to an action for the incidental act of expulsion, which the landlord, merely because of the tenant's own unlawful resistance has been obliged to resort to

<sup>32</sup> Dorrell v. Johnson, 17 Pick. 263, per Shaw, C. J., citing Butcher v. Butcher, 7 Barn. & C. 399. Cp. Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80.

<sup>33</sup> Low v. Elwell, 121 Mass. 309; Winter v. Stevens, 9 Allen, 526; Stone v. Lahey, 133 Mass. 426; Twombly v. Monroe, 136 Mass. 464; Benton v. Williams, 202 Mass. 189, 192; and cases *infra*.

He may eject the tenant "in a peaceable manner." Groustra v. Bourges, 141 Mass. 7.

See as to Forcible Entry, *infra*, §§ 182, 297-299.

in order to make his entry effectual. To hold otherwise would enable a person occupying land utterly without right, to keep out the lawful owner until the end of a suit by the latter to recover the possession to which he is legally entitled.”<sup>34</sup>

The tenant cannot, therefore, maintain any action of tort against the landlord for breaking and entering his close, or for personal damages.<sup>35</sup> The fact that the landlord uses force

<sup>34</sup> Per Gray, C. J., in *Low v. Elwell*, 121 Mass. 309, 312.

In *Winter v. Stevens*, 9 Allen, 526, an instruction was approved that the landlord, “after reasonable notice, had a right to enter upon the premises and could lawfully eject the plaintiff [a tenant at sufferance] therefrom, by force, without being liable to the plaintiff in an action for damages, provided the defendant in removing him used only that degree of force that was absolutely necessary for the purpose of removing the plaintiff from the house.”

In *Lambert v. Robinson*, 162 Mass. 34, 38, Lathrop, J., thus sums up the law: “We are met at the outset with the question, What is the rule of law applicable to the conduct of a person who has a right to enter upon the land of another? The plaintiff contends that the defendants had no right to use personal violence when resisted; that they could not enforce their rights by a breach of the peace; and that upon being resisted, they should have desisted and resorted to legal remedies. The defendants, on the other hand, contend that, having a right to enter and remove the furniture, they were entitled to use such force as was necessary; and that they are only liable in case they used excessive force.

“The plaintiff’s views are in accordance with a dictum of Mr. Justice Wilde in *Sampson v. Henry*, 11 Pick. 379, and with the remarks of Mr. Justice Morton in *Churchill v. Hulbert*, 110 Mass. 42, and with a dictum of Mr. Justice Ames in *Drury v. Hervey*, 126 Mass. 519, which follow and rely upon the dictum in *Sampson v. Henry*. This dictum, however, was held not to be a correct statement of the law, after full consideration in *Low v. Elwell*, 121 Mass. 309. And that case must be considered as settling the law in this Commonwealth, that a person who has a right to enter upon the land of another and there do an act may use what force is required for the purpose, without being liable to an action. If he commits a breach of the peace he is liable to the Commonwealth. If he uses excessive force he is liable to a personal action for an assault. This case has been affirmed in *Coughlin v. Gray*, 131 Mass. 56; in *Stone v. Lahey*, 133 Mass. 426; and in *Twombly v. Monroe*, 136 Mass. 464.”

<sup>35</sup> *Moore v. Mason*, 1 Allen, 407; *Meador v. Stone*, 7 Met. 147; *Groustra v. Bourges*, 141 Mass. 7; *Curtis v. Galvin*, 1 Allen, 215; *Mayo v. Fletcher*, 14 Pick. 525, 532; *Low v. Elwell*, 121 Mass. 309; *Sampson v. Henry*, 13 Pick. 36; *Miner v. Stevens*, 1 Cush. 482; *Eames v. Prentice*, 8 Cush. 337; *Mason v. Holt*, 1 Allen, 45; *Curl v. Lowell*, 19 Pick. 25; *Mugford v. Richardson*, 6 Allen, 76; *Winter v. Stevens*, 9 Allen, 526, 530; *Morrill v. De la*

to effect his entry gives no right to maintain trespass *quare clausum fregit*.<sup>36</sup> The purpose for which the landlord enters is immaterial,<sup>37</sup> and so is the manner of his entry. Thus the landlord may take away the windows and the inside doors.<sup>38</sup> He may set the tenant's furniture out of doors, and is not responsible for injury thereto by rain coming before the tenant can house it;<sup>39</sup> but he has no right to remove the goods to a storehouse at his own expense, if the owner is present and objects to his doing so, even though such removal might prevent damage to the goods, and the owner in such case may sue for conversion.<sup>40</sup> He may also excavate the soil around the house, thereby endangering its safety,<sup>41</sup> or remove the tenant's furniture and eject the tenant's family.<sup>42</sup> The tenant cannot of course impeach the landlord's title under which he enters.<sup>43</sup> Similarly the tenant cannot maintain any action "against any person acting with him [the landlord] or advising and procuring him to act, unless the act complained of, or the means by which it was accomplished are shown to be unlawful." The rights of the tenant are not invaded and evidence of the motives of a lessee of the premises in ejecting the tenant is immaterial.<sup>44</sup>

If however the landlord in expelling the tenant commits a breach of the peace or makes a "forcible entry," he is liable to a criminal proceeding,<sup>45</sup> and is likewise liable to an action of tort for personal injury due to excessive force used by him at the time.<sup>46</sup>

Where the plaintiff declares both for a breaking and enter-

Granja, 99 Mass. 383, 387; *Stone v. Lahey*, 133 Mass. 426. See *Barts v. Morse*, 126 Mass. 226.

<sup>36</sup> *Miner v. Stevens*, 1 Cush. 482.

<sup>37</sup> *Sampson v. Henry*, 13 Pick. 36.

<sup>38</sup> *Meador v. Stone*, 7 Met. 147; *Mugford v. Richardson*, 6 Allen, 76.

<sup>39</sup> *Clark v. Keliber*, 107 Mass. 406, 407, 409; *McGonigle v. Belleisle Co.*, 186 Mass. 310.

<sup>40</sup> *McGonigle v. Belleisle Co.*, 186 Mass. 310.

<sup>41</sup> *Mason v. Holt*, 1 Allen, 45.

<sup>42</sup> *Curtis v. Galvin*, 1 Allen, 215.

<sup>43</sup> *Ibid.* See *infra*, §§ 205-208.

<sup>44</sup> *Groustra v. Bourges*, 141 Mass. 7.

<sup>45</sup> *Low v. Elwell*, 121 Mass. 309. See *Commonwealth v. Shattuck*, 4 Cush. 141; *Lambert v. Robinson*, 162 Mass. 34.

<sup>46</sup> *Sampson v. Henry*, 11 Pick. 379; s. c., 13 Pick. 40; *Low v. Elwell*, 121 Mass. 309; *Lambert v. Robinson*, 162 Mass. 34, 38.



ing and also for an assault, the latter is not a mere aggravation only.<sup>47</sup> It has been held, however, that, in an action of trespass *quare clausum*, a proof of taking and carrying away goods only is bad.<sup>48</sup> Whether a forcible entry and breaking of a dwelling house can be proved as matter of aggravation in a suit for personal injury only, *quære*.<sup>49</sup>

A clause is usually inserted into leases that upon breach of covenant, the lessor may enter and expel the lessee and remove his effects by force if necessary. Such a covenant is not contrary to the law of forcible entry, but even under such a provision the landlord cannot commit a breach of the peace. "By the principles of the common law, some degree of force is allowed in expelling an intruder into a man's lands or tenements who refuses to quit, although he has no right to the possession. The owner is not justified to use such a degree of force as would tend to a breach of the peace, but he is allowed to use such force as would sustain a plea of justification of *molliter manus imposuit*; and to such lawful force the condition in the lease must be considered as having reference."<sup>50</sup>

§ 182. What constitutes a forcible entry.—"To make an entry forcible there must be such acts of violence or such threats, menaces or gestures as may give reason to apprehend personal injury or danger in standing in defense of the possession. But the force made use of must be more than is implied in any mere trespass."<sup>51</sup>

Thus, it is not an assault for the landlord after entering to take away the windows and the inside doors, although the tenant's wife is sick in bed, when the landlord does not know that she is there.<sup>52</sup> In one case, the tenant being notified to leave said he could not because his child was too sick. The landlord then said, "I will move you," and directed his son to put up a ladder in order to take out the windows, took off the door, and began to carry out the tenant's chairs. The

<sup>47</sup> *Sampson v. Henry*, 13 Pick. 40.

<sup>48</sup> *Eames v. Prentice*, 8 Cush. 337, *overruling* *Sampson v. Henry* on that point; *Warner v. Abbey*, 112 Mass. 355, 359.

<sup>49</sup> See *Sampson v. Henry*, 13 Pick. 40, opinion of Wilde, J. *Cp.* *Knapp v. Slocomb*, 9 Gray, 73, 75; *Phelps v. Morse*, 9 Gray, 207.

<sup>50</sup> Wilde, J., in *Fifty Associates v. Howland*, 5 Cush. 218.

<sup>51</sup> *Bouvier Law Dict.* See further on this subject, *infra*, § 299.

<sup>52</sup> *Meador v. Stone*, 7 Met. 147.



tenant resisted and in a scuffle was wounded by a hatchet in the landlord's hand. The court approved instructions that the landlord's right of resuming possession by entry is a qualified and carefully limited right; that he had a right to resume possession without process if he could do so without a breach of the peace; that his right to take out windows and doors and to remove the tenant's property depended on the contingency of his being able to do so without opposition or resistance; that on being resisted and finding he could not remove the furniture or door without a breach of the peace it became his duty immediately to desist; and that he had no right to eject the tenant by actual force.<sup>53</sup> It has also been held that evidence of rushing into a house in a violent and rude manner, throwing the tenant's daughter back on the stairs and frightening her, pushing the tenant's wife against the side of the house, and assaulting the tenant with a rolling pin, is for the jury on the question of excessive force.<sup>54</sup>

In an action for personal injury caused during a forcible entry, evidence that the plaintiff's daughter-in-law was in travail in the house at the time, and that this fact was made known to the defendant before entry by him, is competent as showing malice and aggravation; and evidence that the defendant entered for the purpose of making an attachment is not competent in mitigation.<sup>55</sup> Where the landlord obtains peaceable possession of part of the premises, and the tenant undertakes to prevent his exercising acts of ownership, the landlord may use such force as is necessary to overcome such resistance.<sup>56</sup>

§ 183. Liability of tenant for trespass.—A tenant at sufferance is not liable to an action of tort in the nature of trespass *quare clausum fregit* before entry by the landlord,<sup>57</sup> though

<sup>53</sup> Commonwealth v. Haley, 4 Allen, 318.

<sup>54</sup> Lambert v. Robinson, 162 Mass. 34.

<sup>55</sup> Sampson v. Henry, 11 Pick. 379.

<sup>56</sup> Mugford v. Richardson, 6 Allen, 76. In this case, there was evidence offered to show that the landlord having entered without objection proceeded to take the windows out of one room, when the tenant's wife obstructed his entrance to another room where her child was, whereupon the landlord removed her hold upon the door casings.

<sup>57</sup> Mayo v. Fletcher, 14 Pick. 525, 532; Rising v. Stannard, 17 Mass. 288; Keay v. Goodwin, 16 Mass. 1. Cp. Fitchburg Cotton Mfg. Co. v. Melven, 15 Mass. 268.

So, where the tenant is a mortgagor in possession after condition broken,

he is after entry;<sup>58</sup> and, if he is removed from possession by summary process, he is liable to an action of tort by the landlord for keeping him out of the possession. The damages are for the period from expiration of the tenancy to the time of removal.<sup>59</sup>

§ 184. **Liability of tenant for rent.**—It is now provided by statute that “Tenants at sufferance in possession of land or tenements shall be liable to pay rent therefor for such time as they may occupy or detain the same.”<sup>60</sup> The statute does

or a sale under power, he is not liable to an action of trespass until entry by the mortgagor or purchaser. *Mayo v. Fletcher*, 14 Pick. 525, 532.

<sup>58</sup> *Danforth v. Sargeant*, 14 Mass. 491; *Miner v. Stevens*, 1 Cush. 482.

<sup>59</sup> *Sargent v. Smith*, 12 Gray, 426.

<sup>60</sup> G. L., c. 186, § 3; R. L., c. 129, § 3; Pub. St., c. 121, § 3; Gen. St., c. 90, § 25.

Cited in *Flood v. Flood*, 1 Allen, 218; *Bunton v. Richardson*, 10 Allen, 260; *Knowles v. Hull*, 99 Mass. 562; *Merrill v. Bullock*, 105 Mass. 491; *Durgin v. Busfield*, 114 Mass. 493; *Perkins v. Stockwell*, 131 Mass. 532; *Emmes v. Feeley*, 132 Mass. 346; *Porter v. Hubbard*, 134 Mass. 238; *Cummings v. Watson*, 149 Mass. 263; *Rice v. Loomis*, 139 Mass. 303; *Cofran v. Shepard*, 148 Mass. 583; *Warren v. Lyons*, 152 Mass. 311; *Brown v. Magorty*, 156 Mass. 209; *Devine v. Lord*, 175 Mass. 390; *Dixon v. Smith*, 181 Mass. 218; *Carpenter v. Allen*, 189 Mass. 246; *Edwards v. Hale*, 9 Allen, 462; *Swift v. Boyd*, 202 Mass. 28; *Commercial Wharf Co. v. Boston*, 208 Mass. 482, 487; *Pierce v. Kolikof*, 232 Mass. 479. See *Weston v. Weston*, 102 Mass. 514.

*Historical.* At common law a tenant at sufferance was not liable for rent or for use and occupation, without attornment or a permission to occupy. 4 Kent, 116; *Delano v. Montague*, 4 Cush. 42; *Flood v. Flood*, 1 Allen, 218; *Bunton v. Richardson*, 10 Allen, 260; *Merrill v. Bullock*, 105 Mass. 486, 490; *Kittredge v. Peaslee*, 2 Allen, 235; *Cofran v. Shepard*, 148 Mass. 582; *Benton v. Williams*, 202 Mass. 189, 192. Where the tenant expressly disclaimed any recognition of the title of his landlord, he was virtually not a tenant even at sufferance as regards such landlord, but was a mere trespasser, and *a fortiori* not liable for rent or for use and occupation. *Boston v. Binney*, 11 Pick. 1, 8 and cases *infra*.

These principles have been stated by Gray, J., in *Merrill v. Bullock*, 105 Mass. 486, 490, in these words: “At common law tenants at sufferance were not liable to pay rent strictly so-called, ‘because it was the folly of the owners to suffer them to continue in possession after the determination of the preceding estate.’ Cruise Dig., Title 9, c. 2, § 6; 4 Kent (6th ed.) 116. In this Commonwealth, it has always been held that, where a tenant at sufferance had never occupied under the plaintiff or under any party in privity with him, but claimed to hold under an adverse title, the action for use and occupation could not be maintained; because to

not authorize an action against one who never occupied under an agreement, permission or assent, express or implied, of the plaintiff, or one in privity with him;<sup>61</sup> and to this extent the statute was apparently declaratory of the common law. Nor is a tenant at sufferance, who has been made such by a con-

support such an action there must be evidence of a contract or undertaking by the defendant express or implied; and because, where the defendant had never admitted himself to be a tenant and so estopped himself to deny his landlord's title, conflicting titles to real estate could not be tried in an action of assumpsit. *Allen v. Thayer*, 17 Mass. 299; *Boston v. Binney*, 11 Pick. 1; *Mayo v. Fletcher*, 14 Pick. 525; *Cobb v. Arnold*, 8 Met. 398."

Whether a tenant at sufferance who had permission from the landlord to occupy was liable for use and occupation is not so clear, but apparently such a permission did not make him a tenant at will. In *Porter v. Hubbard*, 134 Mass. 233, 238, Field, J., said on this point: "Whether a tenant at sufferance occupying by permission of his landlord, but without any agreement with him to occupy was liable in this Commonwealth before Gen. Sts., c. 90, § 25, in assumpsit for use and occupation, is a question which is in doubt; *Merrill v. Bullock*, 105 Mass. 486; but permission merely by the landlord to a tenant at sufferance to occupy does not create a tenancy at will. There must be an agreement shown, whereby one agrees to hold and the other to permit him to hold the possession of the premises. *Edwards v. Hale*, 9 Allen, 462." In *Merrill v. Bullock*, 105 Mass. 486, 490, Gray, J., said: "it was assumed by Mr. Justice Wilde in *Keay v. Goodwin*, 16 Mass. 1, 4, and by Chief Justice Shaw in *Gould v. Thompson*, 4 Met. 224, 228, that either a tenant at will or a tenant at sufferance occupying by permission of the landlord was liable to him in action of assumpsit for use and occupation." The learned judge further calls attention to the fact that in *Delano v. Montague*, 4 Cush. 42, this question was not open on the exceptions, the only point presented being whether the tenant at sufferance was liable beyond the time of actual occupation.

Devens, J., in *Emmons v. Scudder*, 115 Mass. 367, 371, appears to have assumed that the tenant was liable for use and occupation, citing *Merrill v. Bullock*, and saying: "When a party remains in possession of premises at the expiration of his term, and no new agreement is made, he becomes a tenant at sufferance. By the common law he was not liable for rent as such, although liable for the fair value of the premises in an action for use and occupation, and the landlord was entitled to resume possession, or the tenant to quit the premises at any time."

<sup>61</sup> *Merrill v. Bullock*, 105 Mass. 491, 493; *Knowles v. Hull*, 99 Mass. 562; *Carpenter v. Allen*, 189 Mass. 246; *Hodgdon v. Haverhill*, 193 Mass. 327, 330; *Pierce v. Kolikof*, 232 Mass. 479.

veyance of which he has no notice or knowledge, liable under this section.<sup>62</sup>

"These statutes do not define to whom a tenant at sufferance shall be liable to pay rent or by whom he may be sued. In the opinion of the majority of the court the intention of the legislature was to remove the doubts which had arisen . . . to prevent any tenant from occupying premises without making compensation to his landlord; and to declare that an action of contract for use and occupation might be maintained wherever the relation of tenant and landlord, either by lease for years or at will, or permission and assent, express or implied, had existed between the defendant and the plaintiff, or between the defendant and any person with whom the plaintiff was in privity of estate, even if he might not, but for the statute, have been in sufficient privity with the defendant to maintain the action; but not to make the occupant of land liable to an action of contract by a person whose title he had never admitted, expressly or by implication, but had always denied, and whose tenant he had never in any sense been; and that this construction is already established by the cases adjudged since the statute.<sup>63</sup>

But the liability of one who has guaranteed the payment of rent by a tenant for years or at will does not continue beyond the end of the term, in the absence of an express agreement, although the tenant holds over as a tenant at sufferance.<sup>64</sup>

Of course, one who is in possession, without being in fact a tenant at sufferance, does not come within the operation of the statute. Thus, a mortgagor in possession after condition broken and before entry by the mortgagee is not a tenant at sufferance, and is not of course liable for rents and profits.<sup>65</sup> Where a husband attempted to underlet premises to his wife

<sup>62</sup> *Dixon v. Smith*, 181 Mass. 218; *Jones v. Donnelly*, 221 Mass. 213, 216 (license).

<sup>63</sup> *Gray, J.*, in *Merrill v. Bullock*, 105 Mass. 486, 492. *Cp. supra*, § 120.

<sup>64</sup> *Brewer v. Knapp*, 1 Pick. 336; *Salisbury v. Hale*, 12 Pick. 424. See *supra*, § 64 and *infra*, § 237.

<sup>65</sup> *Fitchburg Cotton Man. Corp. v. Melven*, 15 Mass. 268; *Gibson v. Farley*, 16 Mass. 280; *Wilder v. Houghton*, 1 Pick. 87; *Boston v. Binney*, 11 Pick. 1; *Mayo v. Fletcher*, 14 Pick. 532; *Porter v. Hubbard*, 134 Mass. 233, 238.

who merely occupied under him, she was held not to become thereby a tenant and liable under the statute.<sup>66</sup> So where a husband has occupied claiming under his wife, one to whom the rents and profits of the estate which belongs to the wife have been set off on execution, cannot maintain an action against the husband under this act.<sup>67</sup>

Where, however, a tenancy at will is terminated by a conveyance of the premises, the tenant is liable to the new purchaser under the statute;<sup>68</sup> "the statute creates the privity and gives the cause of action."<sup>69</sup> If one of two tenants in common makes a lease thereby terminating a tenancy at will, the tenant's duty is to pay the lessee, and the other tenant in common and the lessee cannot join in an action to recover rent from the tenant.<sup>70</sup> Where a tenancy at will is determined through a taking of part of the premises by eminent domain the tenant at sufferance is liable to the landlord under the statute from the date of the conveyance made in pursuance of the taking. "The amount of rent to be paid is not to be determined by 'the proportion which such unconveyed portion bore to the whole estate,' but is the sum which the jury find the use and occupation of that portion for that time were reasonably worth."<sup>71</sup>

One who becomes a tenant at sufferance by holding over after the expiration of a written lease or a tenancy at will is *prima facie* liable to pay rent at the same rate as under the

<sup>66</sup> Knowles v. Hull, 99 Mass. 562.

<sup>67</sup> Merrill v. Bullock, 105 Mass. 486.

<sup>68</sup> Bunton v. Richardson, 10 Allen, 260; Cofran v. Shepard, 148 Mass. 582; Swift v. Boyd, 202 Mass. 26 (where the tenant at sufferance was owner of a building on the land).

<sup>69</sup> Bunton v. Richardson, 10 Allen, 260, per Bigelow, C. J.

In Cummings v. Watson, 149 Mass. 262, the defendants had been tenants at will to C and after C's death paid rent to the same agent of C. as before who gave receipts signed "M. Admx.," and was authorized to collect the rents by M. It appeared that the defendants knew of C.'s death but made no express contract for the use of the premises thereafter. The court said that in the absence of any contract with the heirs at law or with anyone else after the death of C. the defendants would be liable to pay rent to the heirs at law under this statute.

<sup>70</sup> Cofran v. Shepard, 148 Mass. 582.

<sup>71</sup> Field, J., in Emmes v. Feeley, 132 Mass. 346; Devine v. Lord, 175 Mass. 384, 390. Cp. G. L., c. 186, § 4; R. L., c. 129, § 4; Pub. St., c. 121, § 4, also *infra*, § 224.

prior agreement.<sup>72</sup> But this presumption may be overcome by an express refusal of the tenant at the end of the term to pay the previous rental,<sup>73</sup> or by a claim to hold under an adverse title.<sup>74</sup> So also, an express covenant to pay rent at a certain monthly rate, and at that rate for "such further time as the lessee shall hold the leased premises" is a covenant to pay rent at a certain rate while the tenant is a tenant at sufferance, if he continues in occupation of the premises after the expiration of the lease.<sup>75</sup>

§ 185. **Recovery of rent.**—"Such rent may be recovered in contract, and the deed of demise or other written instrument, if any, showing the provisions of the lease, may be used in evidence by either party to prove the amount of rent due from the defendant."<sup>76</sup> This section of the statute is held to require some holding by permission, and so the action of contract is an appropriate form of action.<sup>77</sup> "Such action may be brought by or against executors and administrators for any arrears of rent accrued in the lifetime of the deceased parties, respectively, in the same manner as for debts due from or to the same parties in their lifetime on a personal contract."<sup>78</sup>

<sup>72</sup> *Weston v. Weston*, 102 Mass. 514; *Dimock v. Van Bergen*, 12 Allen, 551; *Davis v. Alden*, 2 Gray, 309; *Bartholomew v. Chapin*, 10 Met. 1; *Edwards v. Hale*, 9 Allen, 464; *Faxon v. Jones*, 176 Mass. 138; *Commercial Wharf Co. v. Boston*, 208 Mass. 482, 487.

<sup>73</sup> *Dimock v. Van Bergen*, 12 Allen, 551, *semble*.

<sup>74</sup> *Flood v. Flood*, 1 Allen, 217; *Boston v. Binney*, 11 Pick. 8; *Allen v. Thayer*, 17 Mass. 299.

<sup>75</sup> *Warren v. Lyons*, 152 Mass. 310; *Commercial Wharf Co. v. Boston*, 208 Mass. 482, 487.

<sup>76</sup> G. L., c. 186, § 5; R. L., c. 129, § 5; Pub. St., c. 121, § 5; Gen. St., c. 90, § 26; Rev. St., c. 60, § 23. Cited in *Bunton v. Richardson*, 10 Allen, 260; *Merrill v. Bullock*, 105 Mass. 486; *Durgin v. Busfield*, 114 Mass. 493; *Emmons v. Scudder*, 115 Mass. 371; *Rice v. Loomis*, 139 Mass. 303; *Warren v. Lyons*, 152 Mass. 311.

<sup>77</sup> *Merrill v. Bullock*, 105 Mass. 486. See, however, strong dissenting opinion by Chapman, C. J., holding that it was meant to include *all* tenants at sufferance, "For the idea of contract is inconsistent with the idea of tenancy at sufferance. The remedy is merely a statute remedy and the form of the action is also given by statute," p. 494.

<sup>78</sup> G. L., c. 186, § 6; R. L., c. 129, § 6; Pub. St., c. 121, § 6; Gen. St., c. 90, § 27; Rev. St., c. 60, § 24; *Daniels v. Richardson*, 22 Pick. 569. See *Cummings v. Watson*, 149 Mass. 262.

## CHAPTER V

### RIGHTS, DUTIES AND LIABILITIES OF PARTIES INTER SE.<sup>1</sup>

§ 186. Implied covenants of title and of quiet enjoyment.<sup>2</sup>—  
“It is clear that, from the word ‘demise,’ in a lease under seal, the law implies a covenant—in a lease not under seal a contract—for *title* to the estate merely; that is for quiet enjoyment against the lessor and all that come in under him, by title, and against all others claiming by title paramount during the term; and the word ‘let’ or any equivalent words, which constitute a lease, have no doubt the same effect, but no more.”<sup>3</sup>

This implication of a covenant may, however, be controlled by other provisions in the lease indicating a different intention of the parties, such as a provision for a sale of the premises. In this case the court said: “The plaintiff’s claim is that, by force of the words ‘lease, demise and let,’ there is an implied covenant for quiet enjoyment, which has been broken by his eviction by the purchaser of the premises. If it be true that these words, uncontrolled and unqualified by any other provisions in the lease, would import such a covenant,

<sup>1</sup> *Implied Covenants*. It is a general principle that a covenant will not be implied where there is an express covenant already covering the same matter. But implied and express covenants may coexist where they are not inconsistent, and the express covenant may modify the implied one. *Gates v. Caldwell*, 7 Mass. 68; *Sumner v. Williams*, 8 Mass. 201 (cases of deeds); *Standen v. Christmas*, 10 Q. B. 135; 1 Taylor, Landl. & Ten., 9th ed., § 253; 1 Wood, Landl. & Ten., 2d ed., § 314. Cp. *Whiting v. Sullivan*, 7 Mass. 107; *Earle v. Coburn*, 130 Mass. 596; *Mass. General Hospital v. Fairbanks*, 129 Mass. 78, 81; *Boston v. Binney*, 11 Pick. 1; *Hills v. Snell*, 104 Mass. 173, 177, to the effect that an implied contract will not be raised against A when there is an express contract with A or B.

<sup>2</sup> Cp. as to implied grants and estoppel to deny grants, *supra*, §§ 37, 38; also Tenancy by Estoppel, *supra*, § 9.

<sup>3</sup> *Hart v. Windsor*, 12 M. & W. 68, per Parke, B., approved in *Foster v. Peyser*, 9 Cush. 245, per Metcalf, J.; *O’Connor v. Daily*, 109 Mass. 235, 236; *Casassa v. Smith*, 206 Mass. 69. See also 6 Am. Law Rev. 614, 617 (1872).



they cannot do so when the lease contains other stipulations which show a different intent of the parties." <sup>3a</sup> The implication also does not, apparently, arise in the case of an *assignment* of a lease, for the assignee has no action against his assignor, though he has one against the original lessor, where the latter evicts him.<sup>4</sup> It should be noticed, furthermore, that the words which imply a covenant for title or for quiet enjoyment do not import any warranty of habitableness, or of fitness for any given purpose.<sup>5</sup>

In regard to this implied covenant that the lessor will do nothing to detract from the possession he has given, the court has said: "It is unnecessary to consider whether a covenant would be implied amounting to a warranty against incumbrances, or a paramount title, or against any rightful claims of third persons; it is sufficient for the present case that the lease contains an implied covenant, which is a good warranty by the defendant against his own acts. Every grant of any right, interest or benefit carries with it an implied undertaking on the part of the grantor that the grant is intended to be beneficial; and that, so far as he is concerned, he will do no act to interrupt the free and peaceable enjoyment of the thing granted." <sup>6</sup>

So the lessor is liable on his implied covenant, if he intentionally puts it out of his power to deliver the premises to the tenant. It is an act of the same nature as putting out a tenant who had taken possession.<sup>7</sup>

There may even be an action based on damage occasioned by fraudulent representation of a good title;<sup>8</sup> but an action

<sup>3a</sup> Per Morton, J., in *O'Connor v. Daily*, 109 Mass. 235.

<sup>4</sup> *Waldo v. Hall*, 14 Mass. 486.

<sup>5</sup> See *supra*, § 76, and *infra*, § 187.

<sup>6</sup> Shaw, C. J., in *Dexter v. Manley*, 4 Cush. 14, 24. See also *Duncklee v. Webber*, 151 Mass. 408; *Foster v. Peyser*, 9 Cush. 242, 246; *Ellis v. Welch*, 6 Mass. 246, 250; *Dickinson v. Goodspeed*, 8 Cush. 119 and *supra*, § 158.

As to alterations tending practically to defeat the purpose of the demise, see *infra*, § 198.

In *Sallinger v. Smith*, 192 Mass. 317, it was held that, where one leased premises to a board of health for a smallpox hospital, and received rents therefor, he could not subsequently maintain an action for damages for such occupation.

<sup>7</sup> *Riley v. Hale*, 158 Mass. 240.

<sup>8</sup> *Milliken v. Thorndike*, 103 Mass. 382.



for the breach of the implied covenant for quiet enjoyment does not involve "the title to land," within the meaning of the statute allowing the prevailing party full costs without regard to the amount of damages recovered.<sup>9</sup>

§ 187. Implied covenant of fitness; defects in property.<sup>10</sup>—**General Rule.**—In a letting of an unfurnished house, or of a building for business purposes, there is no implied covenant or warranty that it is reasonably fit for habitation or for any particular use;<sup>11</sup> consequently the landlord is not liable to

<sup>9</sup> G. L., c. 261, § 4; R. L., c. 203, § 5; Pub. St., c. 198, § 6. *Exeter v. Manley*, 4 Cush. 14, 27. See also *Butterfield v. Caverley*, 6 Cush. 276.

<sup>10</sup> *Cp. supra*, §§ 71, 76, and *infra*, §§ 188–201.

See also a long article on Responsibility for the Condition of Demised Premises in 6 Am. Law Rev. 614 (1872), reviewing the English and American cases.

That there is no implied covenant to repair or that the premises will *continue* fit for any particular purpose, and for the effect of voluntary repairs, see *infra*, § 198.

In all personal injury cases there is now a presumption of due care. G. L., c. 231, § 85. See *infra*, § 195.

<sup>11</sup> *Dutton v. Gerrish*, 9 Cush. 89 (fall of store from weight of dry goods); *Foster v. Peyser*, 9 Cush. 242 (defective drains); *Welles v. Castles*, 3 Gray, 323, 326 (failure to keep adjoining premises in good order); *Gill v. Middleton*, 105 Mass. 477 (see *infra*); *Royce v. Guggenheim*, 106 Mass. 201 (erections upon neighboring lots); *Looney v. McLean*, 129 Mass. 33 (see *infra*); *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357 (steps liable to accumulate ice); *Stevens v. Pierce*, 151 Mass. 207 (defective drainage causing illness); *Ingalls v. Hobbs*, 156 Mass. 348 (bugs); *Cowen v. Sunderland*, 145 Mass. 363 (old cesspool grassed over, but covering defective); *Leavitt v. Fletcher*, 10 Allen, 119, 121 (roof falling from weight of snow); *McKeon v. Cutter*, 156 Mass. 296 (leak in water pipe); *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169 (decayed barn floor); *Booth v. Merriam*, 155 Mass. 521 (decayed wooden support to iron cover of cesspool); *Bertie v. Flag*, 161 Mass. 504 (defective drain causing typhoid fever); *Doyle v. Union Pacific Railway Co.*, 147 U. S. 413 (section house situated so as to be exposed to snow slides); *Lynch v. Swan*, 167 Mass. 510 (stairway); *Marley v. Wheelwright*, 172 Mass. 530 (defective stairway); *Roche v. Sawyer*, 176 Mass. 71 (walk and cellarway); *O'Malley v. Twenty-Five Associates*, 178 Mass. 555 (defective coal hoist); *Jordan v. Sullivan*, 181 Mass. 348 (insufficient lighting); *Roth v. Adams*, 185 Mass. 341; *Taylor v. Finnigan*, 189 Mass. 568 (additional exits to theatre required by building inspector); *Shute v. Bills*, 191 Mass. 433; *Walsh v. Schmidt*, 206 Mass. 405 (defective veranda); *Buldra v. Henin*, 212 Mass. 275 (defective piping); *Stone v. Lewis*, 215 Mass. 594 (defective lighting); *Mackey v. Lonergan*, 221 Mass. 296 (unusually placed stairs); *Mills v. Swanton*,

the tenant for such defects as may make it unfit for use. The doctrine of *caveat emptor* applies, and the rule is the same in reference to a lease of a dwelling house as to a conveyance of real estate of any other kind.<sup>12</sup> This has been expressed as follows: "A tenant is a purchaser of an estate in the land or building hired; and . . . no action lies by a tenant against a landlord on account of the condition of the premises hired, in the absence of an express warranty or of active deceit."<sup>13</sup>

Similarly, in a lease of land there is no implied covenant that it shall be fit for cultivation.<sup>14</sup>

If the contract of hiring is silent as to any warranty, parol evidence that the lessor declared the premises fit for occupancy or for any particular purpose at the time of the hiring is inadmissible;<sup>15</sup> and such representations cannot be made the basis of an action on the contract.<sup>16</sup> Even a covenant that a house is "now in perfect order" refers only to repairs, and not to the present or future condition of the air.<sup>17</sup> The rule applies as well to the letting of several unfurnished rooms

222 Mass. 557 (defective stairs); *Green v. Hammond*, 223 Mass. 318 (dumb waiter); *Barnett v. Clark*, 225 Mass. 185; *Pizzano v. Shuman*, 229 Mass. 240 (unlighted stairway). No warranty is implied by the letting of premises that they are reasonably fit for use. The lessee takes an estate in the demised premises and he assumes the risk of their quality in the absence of an express warranty or deceit. *Conahan v. Fisher*, 233 Mass. 234, 238; *Mansell v. Hands*, 235 Mass. 253.

Whether a landlord is liable for bursting of water pipes apart from special agreement, *qu.* This risk is generally assumed by the tenant. See *Fera v. Child*, 115 Mass. 32.

<sup>12</sup> *Stevens v. Pierce*, 151 Mass. 207; *Foster v. Peyser*, 9 Cush. 242; *Bowe v. Hunking*, 135 Mass. 380; *Cowen v. Sunderland*, 145 Mass. 363. *Cp.* *Moynihan v. Allyn*, 162 Mass. 270; dissenting opinion of Holmes, *Knowlton & Lathrop, JJ.*, in *O'Malley v. Twenty-five Associates*, 170 Mass. 471, 478; *Shute v. Bills*, 191 Mass. 433, 438; *Mansell v. Hands*, 235 Mass. 253.

<sup>13</sup> *Field, J.*, in *Bowe v. Hunking*, 135 Mass. 380, 383, citing *Keats v. Cadogan*, 10 C. B. 591 (Eng.); *Robbins v. Jones*, 15 C. B. N. S. 240 (Eng.); *Hight v. Bacon*, 128 Mass. 10; *Ward v. Hobbs*, 3 Q. B. D. 150 (Eng.); *Howard v. Emerson*, 110 Mass. 320; *O'Malley v. Twenty-five Associates*, 178 Mass. 555, 558.

It is no tort to let premises which are a nuisance. *Miles v. Janvrim*, 196 Mass. 431.

<sup>14</sup> *Foster v. Peyser*, 9 Cush. 242, 247.

<sup>15</sup> *Dutton v. Gerrish*, 9 Cush. 89.

<sup>16</sup> *Ibid.*; *Stevens v. Pierce*, 151 Mass. 207, 209.

<sup>17</sup> *Foster v. Peyser*, 9 Cush. 242.

in a tenement house as to a letting of the whole house, if the rooms pass into the exclusive possession of the tenant.<sup>18</sup> Thus in a case, where the tenant's wife was injured by standing on a defective veranda, the tenant was allowed to testify that the landlord had told him that "he fixed the house all right; it was fit for anybody to live in it." The court said: "The rule *caveat emptor* applies to the purchase and hiring of real estate, and the question before us is whether this testimony having reference to the subject and nature of the conversation between the parties, would warrant a finding that the defendant expressly warranted the house to be in perfect condition in all its parts, so that no accident could happen through any imperfection in it from any proper use that could be made of it. We are of opinion that it would not. The statement was that the house was good, safe and fit to live in. This was of the most general character. It was in the nature of representation and recommendation, or 'dealer's talk,' which should be treated as the expression of an opinion about the effect of conditions which in general were open and obvious, rather than as a warranty as to the details of construction or soundness."<sup>19</sup>

§ 188. Family, employees and visitors of tenant.—General grounds of liability.—In this State, the liability of a landlord extends not merely to the tenant himself, but to certain classes or persons having relations with him. The ground of liability to such persons is not that the landlord has himself invited them upon the premises;<sup>20</sup> but that it is an implied term

<sup>18</sup> *McKeon v. Cutter*, 156 Mass. 296. See *Looney v. McLean*, 129 Mass. 33.

<sup>19</sup> *Walsh v. Schmidt*, 206 Mass. 405, 407, per Knowlton, C. J.

<sup>20</sup> *Jordan v. Sullivan*, 181 Mass. 348; *Bowe v. Hunking*, 135 Mass. 380, 383. Cf. *Walsh v. Schmidt*, 206 Mass. 405; *Dustin v. Curtis*, 67 Atl. 220 (N. H.); *McKenzie v. Chetham*, 83 Me. 543. *Contra*, holding that plaintiffs who were members of tenant associations were invitees of the landlord. *Brunker v. Cummings*, 133 Ind. 443; *Phillips v. Library Co.*, 55 N. J. L. 307; *Fisher v. Jansen*, 30 Ill. App. 91. If such persons were invitees of the landlord they might have greater rights than the tenant himself. *Bowe v. Hunking*, 135 Mass. 380, 383. In *Marwedel v. Cook*, 154 Mass. 235, one visiting a tenant on business was held to be an invitee of the landlord. So in *Domenicis v. Fleisher*, 195 Mass. 281.

Query, whether a tenant's wife can sue on an express warranty of fitness made with the tenant, where five months have elapsed, and the landlord was not obliged to repair. *Walsh v. Schmidt*, 206 Mass. 405, 408.

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of the contract of hiring that the liability shall attach for the benefit of persons authorized by the tenant to use the premises.

Thus, where one, expressly invited by a tenant to visit the premises, was injured by a defective platform under the landlord's control the court said:<sup>21</sup> "The duty of the defendant to keep the platform safe for the tenant and those claiming under him, grew out of the contract of hiring. . . . The contract impliedly included not only the tenant himself, but the members of his family, and his servants and agents who might rightfully occupy and use the tenement with him. It included boarders and lodgers, if, in a proper use of the tenement, such persons might be received there by the tenant. It included all persons who, in connection with the use of the tenement by the tenant, might properly pass over the platform under the express authority of the tenant and in her right."

Prior to the entry of the tenant, the landlord is liable to him alone, and is liable only in contract; after the entry of the tenant, the relation "extends to all persons for whose occupation the lease was taken and who in fact occupy under it," and the landlord is liable to such persons in tort.<sup>22</sup>

Such a liability may exist either where the premises are entirely in the possession and control of the tenant, or where certain parts of the premises are in the control of the landlord. The principles are the same in both cases, as appears from the following:

**§ 188a. Where tenant in control.**—The members of the tenant's family have the same rights as the tenant himself, but no greater;<sup>23</sup> and the same rule applies to subtenants<sup>24</sup> to

<sup>21</sup> *Coupe v. Platt*, 172 Mass. 458, 459, per Knowlton, J.

<sup>22</sup> *Domenicis v. Fleisher*, 195 Mass. 281; *Green v. Pearlstein*, 213 Mass. 360.

<sup>23</sup> *Bowe v. Hunking*, 135 Mass. 380, 383; *Learoyd v. Godfrey*, 138 Mass. 315; *Quinn v. Perham*, 151 Mass. 162; *Moynihan v. Allyn*, 162 Mass. 270; *Freeman v. Hunnewell*, 163 Mass. 210; *Kearines v. Cullen*, 183 Mass. 298; *Cummings v. Ayer*, 188 Mass. 292; *Phelan v. Fitzpatrick*, 188 Mass. 237; *Dalin v. Worcester, etc., St. Ry.*, 188 Mass. 344; *Shute v. Bills*, 191 Mass. 433; *Andrews v. Williamson*, 193 Mass. 92; *Miles v. Janvrin*, 196 Mass. 43; *Miles v. Janvrin*, 200 Mass. 514; *Nash v. Webber*, 204 Mass. 419; *O'Donoghue v. Moors*, 208 Mass. 473; *Stone v. Lewis*, 215 Mass. 594; *Mills v. Swanton*, 222 Mass. 557.

<sup>24</sup> *Marley v. Wheelwright*, 172 Mass. 530; *Stone v. Lewis*, 215 Mass. 594; *Green v. Hammond*, 223 Mass. 318.

the family of a subtenant,<sup>25</sup> servants or employees of the tenant,<sup>26</sup> and to persons visiting the tenant on his express or implied invitation, for the purposes of business or pleasure.<sup>27</sup> So, also, to boarders.<sup>28</sup>

§ 188b. **Where landlord in control.**—The landlord in control of a part of the premises owes the same duty which he owes to the tenant himself to the latter's family,<sup>29</sup> to his servants and employees,<sup>30</sup> and to his boarders and lodgers,<sup>31</sup> but no greater duty.<sup>32</sup>

The same is true of persons who go upon the premises in pursuance of some business relation with the tenant. Thus, the landlord is liable to a teamster injured by an elevator while

<sup>25</sup> *Rolfe v. Tufts*, 216 Mass. 563.

<sup>26</sup> *Freeman v. Hunnewell*, 163 Mass. 210.

<sup>27</sup> *Roche v. Sawyer*, 176 Mass. 71; *Coupe v. Platt*, 172 Mass. 458; *Plummer v. Dill*, 156 Mass. 426; *Jordan v. Sullivan*, 181 Mass. 348; *Elliott v. Pray*, 10 Allen, 378; *Davis v. Central Congregational Society*, 129 Mass. 367; *Hutchinson v. Cummings*, 156 Mass. 329. *Cp.* *Daley v. Kinsman*, 182 Mass. 306; *Mistler v. O'Grady*, 132 Mass. 139; *Stone v. Lewis*, 215 Mass. 594.

<sup>28</sup> *Stenberg v. Willcox*, 96 Tenn. 163.

<sup>29</sup> *Looney v. McLean*, 129 Mass. 33; *Andrews v. Williamson*, 193 Mass. 92; *Domenicis v. Fleisher*, 195 Mass. 281; *Ward v. Blouin*, 210 Mass. 140; *Callahan v. Dickson*, 210 Mass. 510; *Green v. Pearlstein*, 213 Mass. 360; *Noonan v. O'Hearn*, 216 Mass. 583; *Alessi v. Fitzgerald*, 217 Mass. 576; *Fitzsimmons v. Hale*, 220 Mass. 461, 464; *White v. Beverly Bldg. Assoc.*, 221 Mass. 15, 19; *Gallagher v. Murphy*, 221 Mass. 363; *Stagnaro v. Fitzgerald*, 224 Mass. 265; *Yorra v. Lynch*, 226 Mass. 153; *Oles v. Dubinsky*, 231 Mass. 447.

*Cp.* *Grella v. Lewis Wharf. Co.*, 211 Mass. 54; *Mackey v. Lonergan*, 221 Mass. 296.

<sup>30</sup> *Wilcox v. Zane*, 167 Mass. 302; *Leydecker v. Brintnall*, 158 Mass. 292, 298; *O'Malley v. Twenty-five Associates*, 170 Mass. 471; *Dalin v. Worcester, etc., St. Ry.*, 188 Mass. 344; *Dalton v. Gibson*, 192 Mass. 1; *Coupe v. Platt*, 172 Mass. 458, 459; *Ogden v. Aspinwall*, 200 Mass. 100 (elevator); *Maron v. Peabody*, 228 Mass. 432 (defective lighting of stairway); *Cussen v. Weeks*, 232 Mass. 563 (elevator). *Cp.* *Hart v. Cole*, 156 Mass. 475; *Plummer v. Dill*, 156 Mass. 426; *McCoy v. Walsh*, 186 Mass. 369; *Baum v. Ahlborn*, 210 Mass. 336; *Alessi v. Fitzgerald*, 217 Mass. 576.

<sup>31</sup> *Coupe v. Platt*, 172 Mass. 458, 459 (dictum); *Alessi v. Fitzgerald*, 217 Mass. 576.

<sup>32</sup> *Baum v. Ahlborn*, 210 Mass. 336, 338; *Mackey v. Lonergan*, 221 Mass. 296; *Feeley v. Doyle*, 222 Mass. 155; *Pizzano v. Shuman*, 229 Mass. 240.

delivering goods to a tenant;<sup>33</sup> to an officer entering by the request of a tenant to make an arrest;<sup>34</sup> to a letter carrier delivering mail to a tenant;<sup>35</sup> or to a person going to see the tenant on a matter of business,<sup>36</sup> or as a customer,<sup>37</sup> to call an employee of the tenant to his dinner.<sup>38</sup>

On the other hand, the liability is not to be extended beyond the reasonable limits of invitation or use. Thus, where the landlord retains control of both a front and a rear stairway, he is not liable to a customer of his tenant who by mistake opens a door leading to the rear stairway and falls down the rear stairs, as the owner cannot be said to have invited the use of the rear stairs, and is under no obligation or keep locked the door leading to them.<sup>39</sup>

Custom, together with the landlord's knowledge of it may be material in creating liability.<sup>40</sup> Thus, where a tenant was accustomed for many years to take his customers to upper floors on a freight elevator, if the landlord knew of this practice, he is liable to a customer for defects.<sup>41</sup>

The same is true of persons visiting the tenant by express invitation, for a particular purpose and at a particular time.<sup>42</sup>

In this connection may be mentioned a class of cases where, although the person injured is the invitee of the tenant, and the tenant is in control, yet from the nature of the contract between the landlord and the tenant, the invitation by the

<sup>33</sup> *Wright v. Perry*, 188 Mass. 268; *Hamilton v. Taylor*, 195 Mass. 68 (ice-man). Cp. *O'Malley v. Twenty-five Associates*, 170 Mass. 471, 178 Mass. 555 (teamster delivering coal to tenant).

<sup>34</sup> *Learoyd v. Godfrey*, 138 Mass. 315.

<sup>35</sup> *Gordon v. Cummings*, 152 Mass. 513.

<sup>36</sup> *Marwedel v. Cook*, 154 Mass. 235; *Alessi v. Fitzgerald*, 217 Mass. 576; *Waters v. Cotting*, 227 Mass. 405; *Pizzano v. Shuman*, 229 Mass. 240; *Follins v. Dill*, 229 Mass. 321; *Draper v. Cotting*, 231 Mass. 51, 58.

<sup>37</sup> *Morong v. Spofford*, 218 Mass. 50; *Fitzsimmons v. Hale*, 220 Mass. 461, 464; *Mikkanen v. Safety Fund Nat. Bank*, 222 Mass. 150, 154; *Feeley v. Doyle*, 222 Mass. 155.

<sup>38</sup> *Mackey v. Lonergan*, 221 Mass. 296. Query whether such a person is an invitee or a licensee. *Ibid.*

<sup>39</sup> *Morong v. Spofford*, 218 Mass. 50.

<sup>40</sup> *Mikkanen v. Safety Fund Nat. Bank*, 222 Mass. 150.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Coupe v. Platt*, 172 Mass. 458; *Roche v. Sawyer*, 176 Mass. 71 (*scumble*); *Alessi v. Fitzgerald*, 217 Mass. 576; *Pizzano v. Shuman*, 229 Mass. 240. Cp. *Cavanaugh v. Smith*, 226 Mass. 179.

tenant was contemplated, and his occupation was so temporary that the burden of safety may fairly be held to have remained with the landlord.<sup>43</sup> Thus, a temporary lease of a theatre or other public building does not relieve the landlord from liability to invitees of the tenant for defects which the landlord knew or might easily have known at the time of the letting.<sup>44</sup>

§ 188c. Volunteers, licensees, trespassers.—But it seems that, in any case, the liability will not be extended for the benefit of those who come upon the premises for their own convenience merely, without any invitation, either express or which may be fairly implied from the preparation and adaptation of the premises for the purposes for which they are appropriated.<sup>45</sup>

Thus, the landlord is not liable to one coming to borrow money of his brother, a tenant, the latter not being in the business of borrowing money and not expecting him;<sup>46</sup> or to one coming to attend a wake, who is not a relative of the tenants nor invited by them;<sup>47</sup> nor to one going, for her own purposes to inquire concerning a servant;<sup>48</sup> or to seek employment;<sup>49</sup>

<sup>43</sup> Cf. *infra*, § 338.

<sup>44</sup> *Oxford v. Leathe*, 165 Mass. 254. Cp. *Camp v. Wood*, 76 N. Y. 92.

<sup>45</sup> *Severy v. Nickerson*, 120 Mass. 306; *Noonan v. O'Hearn*, 216 Mass. 583, 585; *Alessi v. Fitzgerald*, 217 Mass. 576, 578. Cf. *Laporta v. New York Central R. Co.*, 224 Mass. 100, 103.

<sup>46</sup> *Ganley v. Hall*, 168 Mass. 513 (ice caused by defective gutters over common stairs). Cp. *Dalin v. Worcester, etc., St. Ry.*, 188 Mass. 344.

<sup>47</sup> *Hart v. Cole*, 156 Mass. 475. In this case the court said, p. 477:

"The defendant [landlord] is liable to a visitor of the tenant for the condition of the steps, if the tenant himself would have been liable had the steps been included in the tenement let, and not otherwise. It seems clear that one coming to a dwelling house to do business in which he alone is interested, cannot expect a warmer welcome, or claim greater care for his safety, than if he went for the same purpose to the place of business of the occupant. In either case he is a mere licensee. . . . How far an implied invitation is held out under all conceivable circumstances, and whether an implied invitation to come as a guest for friendly intercourse can create a liability greater than that to an ordinary licensee, it is not easy to decide. No case in this country involving these questions has been brought to our attention. . . . It seems to be the rule in England that an ordinary guest in a dwelling house although expressly invited, has no greater rights than a licensee."

<sup>48</sup> *Plummer v. Dill*, 156 Mass. 426.

<sup>49</sup> *Alessi v. Fitzgerald*, 217 Mass. 576, 578; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 301.



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to inquire the way to a person's house;<sup>50</sup> or who enters the wrong house in search of a tenant;<sup>51</sup> or as a pedler or book agent.<sup>52</sup>

Where an express invitation is given it must be accepted in a reasonable manner. Thus an invitation to a person to take his children to play on a roof, is not an invitation to allow them to go there alone.<sup>53</sup> So a landowner, who has given a real estate agent express permission to show an apartment to a prospective tenant, is not liable when the agent falls on an unfamiliar flight of stairs badly lighted.<sup>54</sup>

Nor does a right to ride up with goods on a freight elevator when delivering them to a tenant include the right to ride on it in the hope of getting goods from the tenant.<sup>55</sup> Nor does an invitation to enter a cellar to deliver goods include one to go about in the dark there in search of a clerk or to pass through the cellar to go upstairs.<sup>56</sup>

§ 189. First exception. Portions of premises under landlord's control.—The doctrine that there is no implied covenant of fitness "applies only to premises which by the terms of the lease [or letting] have passed out of the control of the landlord into the exclusive possession of the tenant." And "where a portion of a building is let, and the tenant has rights of passageway over staircases and entries in common with the landlord and the other tenants, there is no such leasing [or letting] as will exonerate the landlord from all responsibility for the safe condition of that portion of which he still retains control, and which he is bound to keep in repair; as to such portion he still retains the responsibilities of a general owner to all persons, including the tenants of his building," and is liable for want of due care to keep such premises in the con-

<sup>50</sup> *McCarvell v. Sawyer*, 173 Mass. 540.

<sup>51</sup> *Blatt v. McBarron*, 161 Mass. 21.

<sup>52</sup> *Hart v. Cole*, 156 Mass. 475 (dictum).

<sup>53</sup> *McCoy v. Walsh*, 186 Mass. 369 (dictum).

*Cp. Noonan v. O'Hearn*, 216 Mass. 563. In the case of accidents to children, it is usually a question for the jury whether the parent gave sufficient oversight to them so as to be in the exercise of due care. *Noonan v. O'Hearn*, 216 Mass. 583, 585.

<sup>54</sup> *Murphy v. Cohen*, 223 Mass. 54.

<sup>55</sup> *Follins v. Dill*, 221 Mass. 93; s. c., 229 Mass. 321.

<sup>56</sup> *Scanlon v. United Cigar Stores Co.*, 228 Mass. 481. *Cf. Cowen v. Kirby*, 180 Mass. 504; *Morong v. Spofford*, 218 Mass. 9; *Graham v. Pocasset Manuf. Co.*, 220 Mass. 195.



dition they were in or purported to be in at the time of the letting.<sup>57</sup>

This rule is said to rest upon the theory that there is an implied agreement to that effect, arising from the necessities

Looney v. McLean, 129 Mass. 33, 35, per Colt, J. (case of decayed steps); Foster v. Peyser, 9 Cush. 242 (defective drainage); Readman v. Conway, 126 Mass. 374 (defective platform in front of shop); Milford v. Holbrook, 9 Allen, 17 (awning); Woods v. Naumkeag Steam Cotton Co., 134 Mass. 357, 360 (steps liable to accumulate ice); Watkins v. Goodall, 138 Mass. 533 (icy steps due to defective water conductor); Wilcox v. Zane, 167 Mass. 302 (defective roof platform for hanging clothes); Priest v. Nichols, 116 Mass. 401 (water leaking from defective pipe); Leydecker v. Brintnall, 158 Mass. 212 (stairway and passageway used by several tenants undermined); Quinn v. Perham, 151 Mass. 162 (projecting sliver of wood on platform of common passageway); Lynch v. Swan, 167 Mass. 510 (defective common stair); O'Malley v. Twenty-five Associates, 170 Mass. 471 (hoisting apparatus for coal, etc., used by all the tenants); Andrews v. Williamson, 193 Mass. 92; McGowan v. Monahan, 199 Mass. 296 (injury from absence of light in common entry); Hannaford v. Kinne, 199 Mass. 63 (icy steps from gooseneck on gutter with no conductor); Tracey v. Page, 201 Mass. 62 (defective pole holding clothes lines from the various tenements); Nash v. Webber, 204 Mass. 219 (icy steps on rear stairs of apartment house); Faxon v. Butler, 206 Mass. 500 (defective lighting); Ward v. Blouin, 210 Mass. 140 (defective steps); Callahan v. Dickson, 210 Mass. 510 (defective board walk); Green v. Pearlstein, 213 Mass. 360 (defective ceiling); Davis v. Rockport, 213 Mass. 279 (defective board walk); Noonan v. O'Hearn, 216 Mass. 583 (defective railing on platform); Maionica v. Piscopo, 217 Mass. 324 (defective railing); Hydren v. Webb, 219 Mass. 542 (defective freight elevator); Flanagan v. Welch, 220 Mass. 186 (defective stairway); Shea v. McEvoy, 220 Mass. 239 (defective elevator); Fitzsimmons v. Hale, 220 Mass. 461 (defective rear stairs); White v. Beverly Bldg. Assoc., 221 Mass. 15, 19 (defective stair rail); Gallaher v. Murphy, 221 Mass. 363 (defective lighting); Mikkanen v. Safety Fund Nat. Bank, 222 Mass. 150 (defective elevator gates); Hilden v. Naylor, 223 Mass. 290 (defective water conductor); Yorra v. Lynch, 226 Mass. 153 (falling iron capping of party wall); Waters v. Cotting, 227 Mass. 405 (elevator); Pizzano v. Shuman, 229 Mass. 240 (unlighted basement steps); Oles v. Dubinsky, 231 Mass. 447 (defective bulkhead stairway).

Cf. Mackey v. Lonergan, 221 Mass. 296; Tremont Theatre Amusement Co. v. Bruno, 225 Mass. 46; McKeon v. Cutter, 156 Mass. 296 (where the defective pipe was for the tenant's sole use); Leavitt v. Fletcher, 10 Allen, 119; Hart v. Cole, 156 Mass. 475 (defective steps); Kearines v. Cullen, 183 Mass. 298 (defective step in control of tenant); Perkins v. Rice, 187 Mass. 28 (negligent operation of elevator); Andrews v. Williamson, 193 Mass. 92 (defective steps); Domenicis v. Fleisher, 195 Mass. 281.

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of the case.<sup>58</sup> And it applies whether there be many tenants or few.<sup>59</sup> But he is not bound to change the original method of construction.<sup>60</sup> Thus, if at the time of letting, a common passageway was not lighted in the early hours of the morning, there can be no recovery later for injury caused by its not being lighted.<sup>60a</sup>

"[The landlord] is liable for obstructions negligently caused by him but not for not removing obstructions arising from natural causes or the acts of other persons and not causing a defect in the passageway itself."<sup>61</sup> He "owes to his tenant and those employed by such tenant the duty not to expose them to a dangerous condition of the place which reasonable care would have prevented."<sup>62</sup> Thus, "he would be liable for negligently leaving a coal scuttle in a dangerous position, but not for not removing one so placed by another person."<sup>63</sup>

It is not, however, negligence for the landlord to place a mat in a passageway outside the door of another tenement, even though he does not inform the plaintiff tenant that he has done so.<sup>64</sup> In the case of an injury from falling on an icy platform the court stated the principle as follows: "The passageway was uncovered, and but for the conductor the dropping from the eaves would have fallen upon it. The question is not whether the defendant was under any obligation to put the conductor and pipes there or to take any measures to protect the passageway from water from the eaves; but whether, having placed them there and arranged them so that they would divert the water from its natural course and carry it away from the platform, and having let the tenements in that condition, he was liable for a want of repair in the pipe by which the water was discharged artificially in

<sup>58</sup> *Flanagan v. Welch*, 220 Mass. 186, 191, per Loring, J.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357; *Lindsey v. Leighton*, 150 Mass. 285; *Lynch v. Swan*, 167 Mass. 510; *Andrews v. Williamson*, 193 Mass. 92; *McGowan v. Monahan*, 199 Mass. 296; *Hannaford v. Kinne*, 199 Mass. 63; *Pizzano v. Shuman*, 229 Mass. 240, 243. See *Coupe v. Platt*, 172 Mass. 458, and *infra*, § 191.

<sup>60a</sup> *McGowan v. Monahan*, 199 Mass. 296.

<sup>61</sup> *Watkins v. Goodall*, 138 Mass. 533, per W. Allen, J.

<sup>62</sup> *Leydecker v. Brintnall*, 158 Mass. 292, 298, per C. Allen, J.

<sup>63</sup> W. Allen, J., in *Watkins v. Goodall*, 138 Mass. 533.

<sup>64</sup> *McGowan v. Monahan*, 199 Mass. 296.

one place upon the platform so as to make it dangerous when frozen.”<sup>65</sup> Where the landlord owns a block of stores having a wooden platform from the building to the street, with no barriers separating the parts of the platform in front of the several shops from each other, the jury may find that the platform was not leased to the several tenants, within the rule exempting the landlord from liability for repair.<sup>66</sup> Similarly, a landlord who has leased parts of a building to different tenants, remaining in possession of the residue is responsible for the safety of an awning erected across the whole front of the building;<sup>67</sup> and for the iron capping of a party wall.<sup>68</sup> So, a landlord occupying premises above those of his tenant is liable for damage by water to the tenant's goods, caused by a defective pipe over which he had control.<sup>69</sup> So also, where a landlord leases steam power and keeps the control of it, he may be liable for the turning on of it without warning, when it has been turned off at the usual time for the close of work.<sup>70</sup> Similarly, it may be negligence to extinguish the light of a common hallway before the usual time;<sup>71</sup> but it seems that in the absence of express or implied agreement or statutory requirement the landlord of a tenement house is not required to light the hallways at all.<sup>72</sup>

And neither the fact that the landlord employs a janitor who kept the hallways lighted nor the fact that there was a means for lighting basement steps is evidence that the landlord has assumed the obligation of lighting such steps.<sup>73</sup>

Nails which project one-sixteenth and three-sixteenths of an inch above the tread of a common stairway are not a defect, even if the landlord had notice of them before the accident.<sup>74</sup>

<sup>65</sup> *Watkins v. Goodall*, 138 Mass. 533.

<sup>66</sup> *Readman v. Conway*, 126 Mass. 374.

<sup>67</sup> *Milford v. Holbrook*, 9 Allen, 17.

<sup>68</sup> *Yorra v. Lynch*, 226 Mass. 153. In this case the plaintiff was hit while leaning out of the window of his tenement, and the court said he had the same rights as if he had been a traveler on the sidewalk.

<sup>69</sup> *Priest v. Nichols*, 116 Mass. 401.

<sup>70</sup> *Silverman v. Carr*, 200 Mass. 396.

<sup>71</sup> *Faxon v. Butler*, 206 Mass. 500.

<sup>72</sup> *Gallagher v. Murphy*, 221 Mass. 363; *Stone v. Lewis*, 215 Mass. 594; *Flanagan v. Welch*, 220 Mass. 186.

<sup>73</sup> *Pizzano v. Shuman*, 229 Mass. 240, distinguishing *Marwedel v. Cook*, 154 Mass. 235; *Faxon v. Butler*, 206 Mass. 500.

<sup>74</sup> *Johnson v. Fainstein*, 219 Mass. 537.

It is not necessary that the landlord should be aware of a defect in the part of the premises under his control in order to be liable for it.<sup>75</sup> But his knowledge of defects may have a bearing on the question whether he was negligent in making repairs.<sup>76</sup> If he employs a contractor to make alterations on another part of the building, in consequence of which the part used by the tenant at the time of the accident is weakened, he is "bound to use reasonable care to keep or to restore safety."<sup>77</sup> Where a temporary structure is erected pending permanent repairs, the landlord owes the same duty to keep the temporary structure safe.<sup>78</sup>

So if, to induce his tenant to continue the tenancy, he agrees to make certain repairs and alterations, he is liable for faulty workmanship in the making of them; and is liable to all persons who within the contemplation of the landlord and the tenant were to use the premises under the lease.<sup>79</sup>

Where a declaration seeks to establish the liability of a landlord as regard two duties, and the judge rules that there is no liability as to one of them, the plaintiff may rely upon evidence as to the other without a variance.<sup>80</sup>

If an employee of a tenant brings an action against the tenant and another against the landlord for the same injury, and the former suit is settled by an agreement for an entry "neither party, no farther suit to be brought for the same cause of action," this does not bar the latter suit.<sup>81</sup> Nor is such an agreement a release of the landlord.<sup>82</sup> Nor is an agree-

<sup>75</sup> *Leydecker v. Brintnall*, 158 Mass. 292; *Lindsey v. Leighton*, 150 Mass. 285; *Gill v. Middleton*, 105 Mass. 477.

<sup>76</sup> See *Lynch v. Swan*, 167 Mass. 510.

<sup>77</sup> *Robbins v. Atkins*, 168 Mass. 45, *Holmes, J.* (defective stairs). The defendant having shown the facts as to his control over the contractors and his men, any inference from such facts of authority over them is for the jury, and any control given by the written contract with the contractor is for the court, therefore he cannot testify as to his authority. *Ibid.*

<sup>78</sup> *Ward v. Blouin*, 210 Mass. 140.

<sup>79</sup> *Feeley v. Doyle*, 222 Mass. 155. *Cp.* *Wadleigh v. Bumford*, 229 Mass. 122. The fact that the tenant paid for the repairs, in lieu of paying an increased rent, will not make the case one of gratuitous repairs by the landlord, when only the tenant himself can enforce liability. *Feeley v. Doyle*, 222 Mass. 155, *infra*, § 199.

<sup>80</sup> *White v. Beverly Bldg. Assoc.*, 221 Mass. 15, 19.

<sup>81</sup> *White v. Beverly Bldg. Assoc.*, 221 Mass. 15.

<sup>82</sup> *Ibid.*

ment by the tenant to pay a certain sum, the sum not being paid, an accord and satisfaction.<sup>83</sup>

The fact that an unlighted stairway, in the same condition as at the beginning of the tenancy, can be found to be a nuisance, does not give the tenant, or any one in his right, a cause of action against the landlord;<sup>84</sup> for "it is not a tort as against the tenant for a landlord to demise to him premises in such a condition that they are a nuisance."<sup>85</sup>

§ 190. Evidence of control.<sup>86</sup>—The question of actual control is for the jury.<sup>87</sup> On the issue of fact whether a landlord or his tenant is bound to repair a platform in front of a shop, evidence that after an injury the landlord made general repairs, is competent as an admission by the landlord of his liability to keep the platform in repair.<sup>88</sup> So, on the question whether the landlord was in control of an elevator, evidence that he had procured an accident policy covering elevator accidents is admissible.<sup>89</sup> So also evidence that he repaired elevator gates before and after an accident.<sup>90a</sup>

So, evidence that a landlord has taken on himself the care of removing ice and snow from the rear stairs of an apartment house;<sup>90</sup> or has repaired the premises in question.<sup>91</sup>

Evidence that a landlord knew that his tenant intended to use certain rear stairs as an entrance for customers to his store, and that they were so used, will authorize a jury to find the landlord liable for defects.<sup>92</sup>

The mere fact that tenants use stairs connecting with a platform to reach the yard below does not make that part of the platform not used in connection with the stairs common property, or put the landlord in control of a railing attached

<sup>83</sup> *White v. Beverly Bldg. Assoc.*, 221 Mass. 15.

<sup>84</sup> *Pizzano v. Shuman*, 229 Mass. 240.

<sup>85</sup> *Miles v. Janvrin*, 196 Mass. 431, 437.

<sup>86</sup> *Cp. as to Third Persons, infra*, § 337.

<sup>87</sup> *Hilden v. Naylor*, 223 Mass. 290; *Poor v. Sears*, 154 Mass. 539, 548, 549.

<sup>88</sup> *Readman v. Conway*, 126 Mass. 374; *Poor v. Sears*, 154 Mass. 539; *O'Malley v. Twenty-five Associates*, 170 Mass. 471. See *Kearines v. Cullen*, 183 Mass. 298; *Nash v. Webber*, 204 Mass. 419, 425. See also *infra*, § 199.

<sup>89</sup> *Perkins v. Rice*, 187 Mass. 28; *Baum v. Ahlborn*, 210 Mass. 336.

<sup>90a</sup> *Cussen v. Weeks*, 232 Mass. 563.

<sup>90</sup> *Nash v. Webber*, 204 Mass. 419, 424.

<sup>91</sup> *Nash v. Webber*, 204 Mass. 419; *Callahan v. Dickson*, 210 Mass. 510.

<sup>92</sup> *Fitzsimmons v. Hale*, 220 Mass. 461

to such other part of the platform;<sup>93</sup> but a series of staircases on the outside of the rear of a three-family house is probably a common stairway as much as the front stairs inside the house.<sup>94</sup> The temporary removal of a fence separating the common property from private property of the landlord is not an invitation to use the private property;<sup>95</sup> but the fact that a tenant on first moving in uses his own clothesline does not as a matter of law negative the invitation to use a pole in the yard to which various tenants attached their lines, or relieve the landlord from liability to keep it in repair.<sup>96</sup>

The fact that the tenant has covenanted to save the lessor harmless from all damages caused by neglect to remove ice and snow from the roof and adjoining sidewalks, does not make the lessee liable for defects in the sidewalks, nor free the lessor from liability.<sup>97</sup>

On the other hand, where there is no defect, and the landlord has not taken upon himself the duty of cleaning off ice and snow, the landlord is not liable in the absence of any custom as to cleaning.<sup>98</sup>

As between the landlord and his tenants, the landlord is bound to know the extent of the premises still under his own control, and proof of his ignorance of the true boundary line is incompetent.<sup>99</sup>

On the question who is in control of the party walls, the fact that adjoining buildings are lower raises a presumption that the wall was built by the landlord or his predecessors, and that he is in control as against one having a lease of the roof.<sup>100</sup> But a usage that, where an entire house is let to a tenant at will, the owner retains the control of the outside of the house, including its roof and gutters, is unreasonable and contrary to law.<sup>101</sup>

Where a freight elevator is not mentioned in a lease and is oiled and repaired by the engineer of the landlord, it is a

<sup>93</sup> *Phelan v. Fitzpatrick*, 188 Mass. 237.

<sup>94</sup> *Nash v. Webber*, 204 Mass. 419, 423.

<sup>95</sup> *Dalin v. Worcester, etc., St. Ry.*, 188 Mass. 344.

<sup>96</sup> *Tracey v. Page*, 201 Mass. 62.

<sup>97</sup> *Leydecker v. Brintnall*, 158 Mass. 292.

<sup>98</sup> *O'Donoghue v. Moors*, 208 Mass. 473.

<sup>99</sup> *Leydecker v. Brintnall*, 158 Mass. 292.

<sup>100</sup> *Yorra v. Lynch*, 226 Mass. 153.

<sup>101</sup> *Shute v. Bills*, 191 Mass. 433, 438.

question of fact whether the acts of the engineer show control or are voluntary acts for the accommodation of the tenants.<sup>102</sup> In such a case the taking out of an accident policy by the landlord is competent on the question of control.<sup>103</sup>

Where there is a written lease of the premises to a third person, a tenant, injured by a defect in the railing of a common platform, in order to establish the liability of the lessor and claiming that the lease in question was a sham, in order to avoid liability, may show who was in actual control of the building and platform.<sup>104</sup>

When by an oral lease the lessor promised to keep a stairway in repair, and the tenant is injured by his failure to do so, it is no defence that the lessor had parted with the control of the stairway to another, if the tenant was not informed of the fact.<sup>105</sup>

Where a landlord reserves a right to use a stairway "in common with the lessee," he is in the same position as if he were a tenant of the lessee.<sup>106</sup>

An agreement between tenants as to washing stairs does not affect the control of the stairway or liability for defects.<sup>107</sup>

Where the contract of letting is verbal, and there is no direct evidence of its terms, the open and notorious conduct of the parties may be resorted to for the purpose of determining the duties of the landlord.<sup>108</sup>

§ 191. Assumption of risk.—The landlord's whole duty is to keep the portion of the premises still under his control and used by the various tenants "in such condition as it was in or purported to be in, at the time of the letting," and when tenants hire the premises in a certain condition, of which they are at the time aware, or can easily ascertain, they cannot recover for injuries resulting from such a condition.<sup>109</sup> "There is no implied undertaking or duty on the landlord's

<sup>102</sup> *Baum v. Ahlborn*, 210 Mass. 336.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Maionica v. Piscopo*, 217 Mass. 324.

<sup>105</sup> *Flanagan v. Welch*, 220 Mass. 186, 190.

<sup>106</sup> *Flanagan v. Welch*, 220 Mass. 186, 191.

<sup>107</sup> *Flanagan v. Welch*, 220 Mass. 186.

<sup>108</sup> *Gallagher v. Murphy*, 221 Mass. 363; *Fitzsimmons v. Hale*, 220 Mass. 461.

<sup>109</sup> *Freeman v. Hunnewell*, 163 Mass. 210 (elevator well), and cases cited *supra*; also *Baum v. Ahlborn*, 210 Mass. 336.



§ 191 RIGHTS, DUTIES AND LIABILITIES OF PARTIES INTER SE

part to make things better than they are.”<sup>110</sup> He is not an insurer.<sup>111</sup> In the case of an injury from a defective platform the court said: “The plaintiff took a tenement with a poor approach, well knowing its condition. There was no change in it except such as might naturally be expected to occur. The floor of the passage according to her own testimony was composed of old, rough boards, coming to pieces, and she had often observed its condition; and there was no such special newly occurring change for the worse as imposed any duty of repair upon the landlord.”<sup>112</sup> So, a tenant was unable to recover for injuries resulting from defects in a platform, the condition of which was known to the tenant’s wife and could easily have been discovered by the tenant.<sup>113</sup>

This doctrine of assumption of risk by the tenant should be strictly limited, and will not apply to a case where the parts of the premises used in common “are apparently sound and strong at the time of the letting, and are not known to the tenant, but are or ought to be known to the landlord, to be unsound or of insufficient strength.”<sup>114</sup> In a later case, however, this language was held too broad; and, although the tenant had not assumed the risk, the landlord was held liable only for defects of which he had actual knowledge.<sup>115</sup>

So, where an injury was caused by a person stepping through a rotten board in a platform raised four inches above a roof, evidence that the board which broke was badly decayed, and was crossgrained and knotty, and that no repairs had been made on the roof for more than two years, pieces of the broken board and photographs, are for the jury.<sup>116</sup>

Where one was rightfully upon a roof used in common by several tenants, and never noticed its dangerous character,

<sup>110</sup> *O'Malley v. Twenty-five Associates*, 178 Mass. 555, 558, per Holmes, C. J., citing *Quinn v. Perham*, 151 Mass. 162; *Moynihan v. Allyn*, 162 Mass. 270; *Freeman v. Hunnewell*, 163 Mass. 210; *Roche v. Sawyer*, 176 Mass. 71; *Andrews v. Williamson*, 193 Mass. 92; *Johnson v. Fainstein*, 219 Mass. 537.

<sup>111</sup> *Andrews v. Williamson*, 193 Mass. 92.

<sup>112</sup> C. Allen, J., in *Quinn v. Perham*, 151 Mass. 162, distinguishing *Lindsey v. Leighton*, 150 Mass. 285.

<sup>113</sup> *Moynihan v. Allyn*, 162 Mass. 270.

<sup>114</sup> *Lynch v. Swan*, 167 Mass. 510, per Field, C. J.; *Robbins v. Atkins*, 168 Mass. 45. See as to the exercise of due care by the tenant, *infra*, § 195.

<sup>115</sup> *O'Malley v. Twenty-five Associates*, 178 Mass. 555.

<sup>116</sup> *Wilcox v. Zane*, 167 Mass. 302.



and at the time of the accident was in the usual course of her duty, the question of due care is for the jury. "She had no such duty to observe the condition of the roof in regard to safety as the defendant [landlord] had."<sup>117</sup>

§ 192. **Second exception. Concealed defects.**—A second exception to the general rule that there is no implied covenant of fitness exists if the owner lets premises which are not merely defective, but which contain positive agencies of injury, such as infectious germs of disease, which concealed defects are known to the owner, but which the tenant has no means of finding out. An owner is liable under such circumstances in an action of tort.<sup>118</sup>

The duty violated in such a case is a duty to inform the tenant of the danger, and there can obviously be no such duty without knowledge of the defect;<sup>119</sup> therefore, to hold the lessor responsible, it must appear either that he knew of the defect or ought to have known of it.<sup>120</sup>

"It [the rule of *caveat emptor*] does not apply to cases of

<sup>117</sup> *Wilcox v. Zane*, 167 Mass. 302; *O'Malley v. Twenty-five Associates*, 170 Mass. 471. See also *Due Care*, *infra*, § 195.

<sup>118</sup> *Minor v. Sharon*, 112 Mass. 477 (house infected with small-pox); *Cutter v. Hamlen*, 147 Mass. 471 (house infected with diphtheria); *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357, 359; *Bowe v. Hunking*, 135 Mass. 380; *Cowen v. Sunderland*, 145 Mass. 363 (cesspool covered with boards, earth and grass); *Stevens v. Pierce*, 151 Mass. 209; *Watkins v. Goodall*, 138 Mass. 533 (defective water conductor producing ice on steps); *Booth v. Merriam*, 155 Mass. 521; *Martin v. Richards*, 155 Mass. 381 (old privy roofed over); *Lynch v. Swan*, 167 Mass. 510, 512. *Cp.* *Littlehale v. Osgood*, 161 Mass. 340 (defective drainage causing diphtheria); *O'Malley v. Twenty-five Associates*, 178 Mass. 555, 558 (dictum); *Walsh v. Schmidt*, 206 Mass. 405.

See analogous cases of liability of a landowner for injury due to an unsafe condition of his land or the access to it. *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216; *Sweeny v. Old Colony, etc., R. R. Co.*, 10 Allen, 368; *Elliott v. Pray*, 10 Allen, 378; *Wendell v. Baxter*, 12 Gray, 494.

Also implied warranty in regard to chattels, *French v. Vining*, 102 Mass. 132 (hay sold for cattle feed on which seller knew white lead had been spilt).

<sup>119</sup> *O'Malley v. Twenty-five Associates*, 178 Mass. 555, 558 (dictum).

<sup>120</sup> *Shute v. Bills*, 191 Mass. 433, citing *Martin v. Richards*, 155 Mass. 381; *Cutter v. Hamlen*, 147 Mass. 471; *Cowen v. Sunderland*, 145 Mass. 363; *Bowe v. Hunking*, 135 Mass. 380; *Minor v. Sharon*, 112 Mass. 477.

fraud. It does not apply to the sale or delivery of dangerous or noxious articles. It is held that 'a man who delivers an article which he knows to be dangerous or noxious to another person, without notice of its nature or qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result therefrom, to that person or any other who is not himself at fault.'<sup>121</sup> The foundation of liability in these cases where there is no warranty and no misrepresentation is negligence. . . . This principle of law relating to dangerous or noxious articles has been applied to the letting of tenements. . . . When a house is infected with small-pox, the danger to life is from a cause that cannot be discovered by the tenant from any examination he may make. It is obvious that there may be other concealed sources of mischief about a house which no examination can discover. . . . If the landlord knew of such, it might be his duty to give information to the tenant. Such traps or contrivances are not merely a want of repair; they are in a sense active agencies of mischief, which no tenant would expect to find in even a decayed and ruinous tenement."<sup>122</sup>

In one case,<sup>123</sup> the plaintiff fell into an old cesspool which had been covered with boards, earth and grass. The boards had become rotten, and gave way when the plaintiff stepped upon them. It was held that the case should have been allowed to go to the jury on the questions whether the landlord knew of the defective covering and the danger therefrom, and had negligently omitted to inform the plaintiff, and whether plaintiff, making careful examination, had been injured by want of proper information. It appeared that the person who covered the cesspool originally did not know whether the boards used were rotten at that time or not, and that there was no other evidence to show whether the boards were rotten either when the cesspool was covered or when the premises were let. "The case, in effect, determines that the jury might infer knowledge by the defendant [landlord] at the time of the letting from the knowledge which he had at the time the cesspool was covered; and that evidence of the condition of the cesspool at this time and of what was then done

<sup>121</sup> *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Norton v. Sewall*, 106 Mass. 143.

<sup>122</sup> *Field, J.*, in *Bowe v. Hunking*, 135 Mass. 380, 384.

<sup>123</sup> *Cowen v. Sunderland*, 145 Mass. 363.

to it was admissible.”<sup>124</sup> But, in another case,<sup>125</sup> where a cesspool was covered by an iron cover set in a wooden frame, and was level with the surface of the ground, so that every one could see it, Knowlton, J., said: “The accident happened solely because the frame was old and out of repair, and there is nothing to show that its condition was not easily discoverable on examination, or that the defendant had actual knowledge of its condition or was culpably responsible for it. It was as much the duty of the plaintiff, when she hired the house and yard, to examine the premises and ascertain whether they were in such repair that she could safely use them, as of the defendant.”

“If the condition of the [premises previous to the letting] was a dangerous one, and the [landlord’s] attention was called to it, and he undertook to remedy it, and used means which were ineffectual for that purpose, and which he knew or ought to have known were ineffectual, he cannot escape liability by employing a servant to do the work, or escape the consequence of that servant’s neglect to do the work properly. The knowledge of the condition of the vault which the servant had, must be imputed to the master.”<sup>126</sup>

The action for deceit in letting an infected dwelling house, causing injuries to the person, survives under the statute.<sup>127</sup> “In such cases the action is not for the deceit alone, the naked *injuria*, but for the damage caused by the deceit. The nature of the damage sued for, not the nature of its cause, determines whether the action survives.”<sup>128</sup>

In the case of premises infected with disease or being in a condition productive of disease, the plaintiff must show that the premises were in fact the cause of the sickness sued for. “The jury cannot act on mere conjecture or speculation.”<sup>129</sup> On the question whether a vault covered over was dangerous

<sup>124</sup> Criticism by Lathrop, J., in *Martin v. Richards*, 155 Mass. 381.

<sup>125</sup> *Booth v. Merriam*, 155 Mass. 521.

<sup>126</sup> Lathrop, J., in *Martin v. Richards*, 155 Mass. 381, 386. *Cp.* *French v. Vining*, 102 Mass. 132.

<sup>127</sup> G. L., c. 228, § 1; R. L., c. 171, § 1; Pub. St., c. 165, § 1. *Cutter v. Hamlen*, 147 Mass. 471; *Lufkin v. Cutting*, 225 Mass. 607.

<sup>128</sup> *Cutter v. Hamlen*, 147 Mass. 471, per Holmes, J. *Cp.* *Norton v. Sewall*, 108 Mass. 143; *Cutting v. Tower*, 14 Gray, 183; *Erickson v. Buckley*, 230 Mass. 467, 472.

<sup>129</sup> *Littlehale v. Osgood*, 161 Mass. 340.

to health at the time of the letting, the testimony of an agent of the board of health, who had examined the premises two years and a half before the letting, is competent, if coupled with evidence that offensive odors came from the vault down to the time of the letting, and that nothing had been done to it in the meantime except to put in some lime and to cover it.<sup>130</sup> On the same issue, the tenant may be asked whether he had any trouble from offensive odors coming from the vault after he moved into the premises.<sup>131</sup> The landlord is not liable, however, where the children of a tenant catch an infectious disease in consequence of entering rooms not leased to their father but forming a separate and distinct tenement.<sup>132</sup>

§ 193. *Duty of landlord as to disclosing defects.*—Where the landlord during the tenancy discovers a defect, he is under no obligation to disclose it to the tenant, nor to make any repairs.<sup>133</sup> Thus, in one case,<sup>134</sup> there was evidence that the lessor knew that a child of a former tenant had died of diphtheria in the house which was subsequently fumigated and made satisfactory to the board of health; that he knew the drains to be in bad condition and made misleading statements to the lessee in regard thereto; and that the lessee did not know that there had been diphtheria in the house. There was also evidence that the lessee was warned at the time of the letting that the lessor was old, forgetful and incapable, and that he was to deal only with the lessor's agent, as well as evidence which, it was contended, showed lack of due care on the part of the lessee. It was held that there was evidence for the jury that the lessor knew or ought to have known that there was special danger of infection from the drains, which he was bound to disclose to the lessee, and which he was not warranted in assuming to be removed by the doings of the board of health. The court, however, said: "But it

<sup>130</sup> *Martin v. Richards*, 155 Mass. 381. *Cp. Brooks v. Petersham*, 16 Gray, 181.

<sup>131</sup> *Martin v. Richards*, 155 Mass. 381.

<sup>132</sup> *Minor v. Sharon*, 112 Mass. 477.

<sup>133</sup> *Bertie v. Flagg*, 161 Mass. 504 (case of defective drain discovered while repairing a defective yard). "This defect was an ordinary defect in the drain in use on the premises, and the danger was the ordinary danger from that source," per Holmes, J., in *Shute v. Bills*, 191 Mass. 433.

<sup>134</sup> *Cutter v. Hamlen*, 147 Mass. 471.

is not enough that the landlord knows of the source of danger, unless also he knows, or common experience shows, that it is dangerous. He is bound at his peril to know the teachings of common experience, but he is not bound to foresee results of which common experience would not warn him, and which only a specialist would apprehend. . . . The general rule between landlord and tenant, as well as between buyer and seller, is *caveat emptor*. And this rule cannot be eluded by showing that the tenant did not know of a defect, that the landlord did, and then asking a jury to pronounce it a secret source of danger. Everybody knows that houses in a city have drains, are liable to get out of order, or to prove unsatisfactory. The possibility is manifest, and there is strong ground for requiring the tenant to insist on a warranty if he does not wish to take the risk.”<sup>135</sup>

§ 194. **Third exception. Furnished dwellings.**—Furnished dwellings are an exception to the general rule that there is no implied covenant of fitness in a letting of premises. In the case of furnished houses or apartments, there is an implied warranty that the premises are reasonably fit for occupancy.<sup>136</sup>

This distinction is brought out by the following language of the court in discussing a lease of an unfurnished building, namely, a warehouse. “[The building] is not described as hired or intended for any specific purpose, or for any particular kind or branch of business; and though it was known that the plaintiffs were dealers in dry goods, and would probably use the warehouse in that business, yet that is not expressed in the written agreement; and it would have been quite within the right of the lessees to use the estate for any other branch of business or for a manufactory or dwelling house. It, therefore, does not come within the authority of cases wherein furnished rooms in a lodging house are let for parlor, bedroom, and the like, for a particular season of the year, in which a warranty may be implied that the rooms are properly furnished and suitably fitted for such particular use.”<sup>137</sup>

In a lease of a completely furnished dwelling house “for a season,” there is an implied agreement that the house is fit for habitation, without greater preparation than one hiring it for a short time might reasonably be expected to make in

<sup>135</sup> *Cutter v. Hamlen*, 147 Mass. 471, 474, per Holmes, J.

<sup>136</sup> *Dutton v. Gerrish*, 9 Cush. 89, 94; *Foster v. Peyser*, 9 Cush. 242.

<sup>137</sup> *Dutton v. Gerrish*, 9 Cush. 89.

appropriating it to the use for which it was designed.<sup>138</sup> "Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when it is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence, may be supposed to contract in reference to a well understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay and without the expense of preparing it for use. It is very difficult and often impossible for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine of *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at that time."<sup>139</sup>

Where the question whether such an implied warranty of fitness exists was not considered at the trial, it cannot be considered on exceptions.<sup>140</sup>

§ 195. Due care.<sup>141</sup>—Of course, in cases between landlord and tenant, as in other cases, the lessee, in order to recover, must be in the exercise of due care and rightfully in the place where he is injured.<sup>142</sup> Thus, a lessor is under no liability to an employee of a lessee who rides on a freight elevator run by the lessor, in disregard of notices plainly posted.<sup>143</sup> Nor is he liable to one visiting the lessee on business, and using the freight elevator for riding without freight, which the lessee himself was not allowed by the lease to do.<sup>144</sup> And neither the acquiescence of the lessor's janitor in violation of the

<sup>138</sup> *Ingalls v. Hobbs*, 156 Mass. 348 (furniture, etc., infested with bugs).

<sup>139</sup> *Ingalls v. Hobbs*, 156 Mass. 348, 350, per Knowlton, J.

<sup>140</sup> *Littlehale v. Osgood*, 161 Mass. 340.

<sup>141</sup> See also Assumption of Risk, *supra*, § 191.

<sup>142</sup> *Cp. Wilcox v. Zane*, 167 Mass. 302; *O'Malley v. Twenty-five Associates*, 170 Mass. 471.

<sup>143</sup> *McCarthy v. Foster*, 156 Mass. 511; *Lynch v. Swan*, 167 Mass. 510.

<sup>144</sup> *Follins v. Dill*, 229 Mass. 321.

rule by the lessees;<sup>145</sup> nor any custom of the lessees as to such use of the freight elevator, can bind the lessor.<sup>146</sup>

In case of premises infected with small-pox, it is a question for the jury whether the tenant was negligent in not causing his family to be vaccinated, or in not procuring a proper person to vaccinate them;<sup>147</sup> and, in general, whether he was guilty of contributory negligence.<sup>148</sup>

The mere fact that the injured tenant knew previously of the want of repair is not conclusive evidence that he as plaintiff was not in the exercise of due care.<sup>149</sup> It is "material only to the point whether he has used due diligence in avoiding the danger."<sup>150</sup>

It is now provided by statute that "In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care, and contributory negligence on his part shall be an affirmative defence to be set up in the answer and proved by the defendant."<sup>151</sup>

§ 196. Evidence.—Where an injury to a tenant has occurred through a defect in the premises, another tenant who has testified to the condition of the premises cannot testify that the same accident previously happened to himself, and that the defect was in the same condition at that time.<sup>152</sup> So, where the landlord was not required to light a hallway, and an accident occurred on steps outside the house, a witness cannot be asked whether there was any light in the hallway.<sup>153</sup> Both these matters would tend to divert the jury from the main issue.

When in the ordinary experience of mankind an accident

<sup>145</sup> *Follins v. Dill*, 229 Mass. 321.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Minor v. Sharon*, 112 Mass. 477.

<sup>148</sup> *Cutter v. Hamlen*, 147 Mass. 475.

<sup>149</sup> *Looney v. McLean*, 129 Mass. 33 (defective stairs).

<sup>150</sup> *Reed v. Northfield*, 13 Pick. 94; *Whittaker v. West Boylston*, 97 Mass. 273.

<sup>151</sup> G. L., c. 231, § 85. *Crudo v. Milton*, 233 Mass. 229; *Levy v. Steiger*, 233 Mass. 600; *Mercier v. Union Street Ry.*, 234 Mass. 85; *Healy v. Boston Elevated Ry.*, 235 Mass. 150; *Quinlan v. Hugh Nawn Cont. Co.*, 235 Mass. 190; *Labrecque v. Donham*, 236 Mass. 10; *Sullivan v. Chadwick*, 236 Mass. 130. *Cp. Benton v. Watson*, 231 Mass. 582 (invitee v. landowner).

<sup>152</sup> *Dean v. Murphy*, 169 Mass. 413.

<sup>153</sup> *Ibid.*



could not have happened without a fault in construction, the principle of *res ipsa loquitur* applies.<sup>154</sup>

§ 197. **Liability for express misrepresentation.**—If the landlord, at the time of the hiring, gives a fraudulent or erroneous description of the premises, he may be liable. But this does not proceed at all upon the theory of an implied contract, but of an independent wrong, for which he is liable in an action of tort.<sup>155</sup> Thus, he is liable for statements made as of his own knowledge as to the condition of the plumbing in a house.<sup>156</sup>

The landlord may also be liable for the fraudulent representations of his agent,<sup>157</sup> even though the deceit was not the entire inducement for the letting.<sup>158</sup> But a mortgagee of a dwelling house is not liable for misrepresentations as to its sanitary condition made by the mortgagor in letting the premises, unless the latter was acting as his agent.<sup>159</sup>

As to deceit in letting an infected dwelling house, and the survival of the action of deceit, see *Concealed Defects, supra*, § 192.

§ 198. **Implied covenants of continuance of fitness; repairs, alterations, injury, destruction.**<sup>160</sup>—**Duty of landlord.**—Just as we have seen<sup>161</sup> that there is no implied covenant of fitness

<sup>154</sup> *Feeley v. Doyle*, 222 Mass. 155, 158. *Cf. Green v. Hammond*, 223 Mass. 318.

<sup>155</sup> *Foster v. Peyser*, 9 Cush. 242, 248; *Stevens v. Pierce*, 151 Mass. 207, 209. *Cp. Littlehale v. Osgood*, 161 Mass. 340, also *supra*, §§ 192, 193.

"We suppose it is well settled by the authorities that although covenant or assumpsit according to the form of the contract would lie for a breach of a contract of warranty; yet alleging such warranty to be false, case will also lie, so that counts on a false warranty may be joined in the same declaration with counts on a false representation." Shaw, C. J., in *Dutton v. Gerrish*, 9 Cush. 89.

<sup>156</sup> *Clogston v. Martin*, 182 Mass. 469; *Harrington v. Douglas*, 181 Mass. 178.

<sup>157</sup> *Tilden v. Greenwood*, 149 Mass. 567; *Harrington v. Douglas*, 181 Mass. 178.

<sup>158</sup> *Harrington v. Douglas*, 181 Mass. 178.

<sup>159</sup> *Tilden v. Greenwood*, 149 Mass. 567.

<sup>160</sup> See as to express covenants to repair, *supra*, §§ 71-74; Alterations and Additions, *supra*, §§ 81, 82; Destruction by Fire, *supra*, § 137; Defects in Property, *supra*, §§ 187-197; Liability to Third Persons, *infra*, §§ 334-343.

<sup>161</sup> *Supra*, § 187.



in the letting of premises, so there is *a fortiori* no implied covenant that the property shall *continue* fit for the purpose for which it was originally demised.<sup>162</sup> In other words, in the absence of express agreement to that effect, the landlord is not bound to make any repairs or to rebuild in case of injury to or destruction of the premises;<sup>163</sup> and if, after the letting he promises to put the premises into tenantable condition, the landlord may repudiate that promise before performance.<sup>164</sup>

On the other hand, the landlord having granted a certain estate, including any rights which he may have, reasonably necessary to the enjoyment of such estate, is not at liberty to make alterations of such a character as practically to defeat the grant.<sup>165</sup> Thus, where a firm of dentists had hired a suite

<sup>162</sup> *Foster v. Peyser*, 9 Cush. 242, 247; *Walsh v. Schmidt*, 206 Mass. 405; *Barnett v. Clark*, 225 Mass. 185; *Conahan v. Fisher*, 233 Mass. 234, 238. But see *Faxon v. Butler*, 206 Mass. 500, holding that a tenant who knew the construction of hallways usually lighted at night did not assume the risk of them unlighted. It is no tort to continue premises in the ruinous condition in which they were demised. *Miles v. Janvrin*, 196 Mass. 431.

<sup>163</sup> *Fowler v. Bott*, 6 Mass. 63; *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, 9 Cush. 242; *Welles v. Castles*, 3 Gray, 326; *Gill v. Middleton*, 105 Mass. 477; *Leavitt v. Fletcher*, 10 Allen, 119; *Kramer v. Cook*, 7 Gray, 550; *Roth v. Adams*, 185 Mass. 341; *Cummings v. Ayer*, 188 Mass. 292; *Phelan v. Fitzpatrick*, 188 Mass. 237; *Bowe v. Hunking*, 135 Mass. 380; *Tuttle v. Gilbert Manuf. Co.*, 145 Mass. 169; *McLean v. Fiske Wharf, etc., Co.*, 158 Mass. 472; *Shute v. Bills*, 191 Mass. 433; *Galvin v. Beals*, 187 Mass. 250, 252; *Kearnes v. Cullen*, 183 Mass. 298; *Commonwealth v. Watson*, 97 Mass. 562, 563; *Looney v. McLean*, 129 Mass. 33; *Mellen v. Morrill*, 126 Mass. 545, 546; *Voss v. Sylvester*, 203 Mass. 233; *Stewart v. Cushing*, 204 Mass. 154 (defective drain); *Buldra v. Henin*, 212 Mass. 275 (defective gas pipes); *Green v. Hammond*, 223 Mass. 318 (dumb waiter); *Lane v. Raynes*, 223 Mass. 514.

See also *Bigelow v. Collamore*, 5 Cush. 226; *Davis v. Alden*, 2 Gray, 309; *Wells v. Calnan*, 107 Mass. 514; *Szathmary v. Adams*, 166 Mass. 145; *Marley v. Wheelwright*, 172 Mass. 530.

"The general rule in this Commonwealth must be considered as settled that a tenant cannot recover against his landlord for personal injuries occasioned by the defective condition of the premises let, unless the landlord agrees to repair, makes the repairs and is negligent in making them." *Galvin v. Beals*, 187 Mass. 252, per Lathrop, J.

<sup>164</sup> *Buldra v. Henin*, 212 Mass. 275. See, also, *infra*, § 199.

<sup>165</sup> *Brande v. Grace*, 154 Mass. 210. See *Salisbury v. Andrews*, 128 Mass. 336. Compare as to implied grants, *supra*, § 11. See also Implied Covenant for Quiet Enjoyment, *supra*, § 186.

of rooms in a building set back from the street line, the interval having been used for a sidewalk but never dedicated to the public, it was held that the landlord could not alter the building so that in effect a new room was interposed between the rooms in question and the front of the building. The court said: "It is not like the case of the erection of a building, either by a stranger or by the lessor, upon an adjoining lot, which is adapted to having a separate building erected upon it. . . . The subject of the lease is so materially changed that the rooms will no longer answer to the description of them in the lease when the condition and situation of the premises are also looked at." <sup>166</sup>

§ 199. Where landlord voluntarily repairs.—If the landlord, being under no obligation to make the premises habitable, voluntarily promises to make them so without further consideration for the promise than the relation of the parties, he is not bound by such promise; but if he proceeds to repair and does it negligently or unskilfully, he is liable to the tenant for injury occasioned thereby; <sup>167</sup> but not to the family, employees or invitees of the tenant; <sup>168</sup> for the promise to repair is not made to them, and the landlord owes them no duty by reason of his promise. <sup>169</sup>

Where a landlord undertakes to make repairs gratuitously he is liable only for gross negligence, in case of conscious suffering caused by an injury therefrom; but where death is caused by such act, the liability being wholly statutory, under the terms of G. L., c. 229, § 5, a landlord as well as others causing

<sup>166</sup> *Brande v. Grace*, 154 Mass. 210, 212, per Allen, J.

<sup>167</sup> *Gill v. Middleton*, 105 Mass. 477; *Tuttle v. Gilbert M'f'g Co.*, 145 Mass. 169; *Galvin v. Beals*, 187 Mass. 250 (dictum); *Shute v. Bills*, 191 Mass. 433; *Buldra v. Henin*, 212 Mass. 275 (defective gas pipes); *Thomas v. Lane*, 221 Mass. 447 (defective rails); *McLeod v. Rawson*, 215 Mass. 257; *Lane v. Raynes*, 223 Mass. 514 (dictum).

*Cp.* *Riley v. Lissner*, 160 Mass. 330; *France v. Makes*, 223 Mass. 71; *Stewart v. Cushing*, 204 Mass. 154, 157; *Dix v. Old Colony Street Railway*, 202 Mass. 518, 523; *Rolfe v. Tufts*, 216 Mass. 563, 566; *Feeley v. Doyle*, 222 Mass. 155; *Steamboat New World v. King*, 16 How. (U. S.) 469.

<sup>168</sup> *Thomas v. Lane*, 221 Mass. 447 (invitee).

In *Gill v. Middleton*, 105 Mass. 477, the wife of the tenant was allowed to recover; but in *Thomas v. Lane*, 221 Mass. 447, 452, Loring, J., said that that decision depended upon the peculiar facts of the case.

<sup>169</sup> *Cf.* *Feeley v. Doyle*, 222 Mass. 155.

the death of a human being by negligence is subject to the penalty there provided for ordinary negligence.<sup>169a</sup>

*Res ipsa loquitur*.—It must appear that the landlord, in making the repairs was guilty of negligence. Thus, the fact that plaster fell from a ceiling two weeks after the landlord's agent had replastered it, if unexplained, is no evidence of a defect in the plaster or of negligence in laying it.<sup>170</sup> Where there is no warranty of fitness, a case is not taken out of the general rule that the landlord is not liable by the mere fact that he had agreed to repair within a reasonable time.<sup>171</sup>

As was said in a case when a tenant at will was injured by the giving way of rotten steps: "As the action is in tort for actual negligence, it is not enough to show that the defendant [landlord] failed to comply with his agreement to make repairs, even after notice. She [the tenant] must go further and show that the landlord actually made the repairs, and was negligent in making them, thus causing her injury."<sup>172</sup>

Where a lease is silent as to who shall make repairs, a voluntary repairing by the landlord is not an admission of a liability to make the repairs,<sup>173</sup> and *a fortiori* where the repairs are made by an agent whose authority from the landlord is not shown.<sup>174</sup>

<sup>169a</sup> *Bergeron v. Forest*, 233 Mass. 392, 399; *Brown v. Thayer*, 212 Mass. 392, 397, 398; *Flynn v. Lewis*, 231 Mass. 550.

<sup>170</sup> *Wadleigh v. Bumford*, 229 Mass. 122.

<sup>171</sup> *Tuttle v. Gilbert M'f'g Co.*, 145 Mass. 169. Morton, C. J., said, p. 175: "As a general rule there must be some active negligence or misfeasance to support tort. There must be some breach of duty distinct from breach of contract. In the case at bar the utmost shown against the defendant is that there was unreasonable delay in performing an executory contract. As we have seen, it is not liable by reason of the relation of lessor and lessee, but its liability, if any, must rest solely upon a breach of this contract." *Buldra v. Henin*, 212 Mass. 275; *Lane v. Raynes*, 223 Mass. 566.

See also *Miles v. Janvrin*, 196 Mass. 431; *Cavalier v. Pope*, [1905] 2 K. B. 757; *Cavalier v. Pope*, [1906] A. C. 428.

<sup>172</sup> *Lane v. Raynes*, 223 Mass. 514, 515, per De Courcy, J.

<sup>173</sup> *Kearines v. Cullen*, 183 Mass. 298; *McKeon v. Cutter*, 156 Mass. 296, 298; *McLean v. Fiske Wharf, etc., Co.*, 158 Mass. 472, 474; *Phelan v. Fitzpatrick*, 188 Mass. 237; *Dalton v. Gibson*, 192 Mass. 1; *Hannaford v. Kinne*, 199 Mass. 63; *Nash v. Webber*, 204 Mass. 419, 425.

<sup>174</sup> *Kearines v. Cullen*, 183 Mass. 298; *Rolfe v. Tufts*, 216 Mass. 563.

The agent's authority cannot be shown by his own acts and declarations not brought home to the lessor. *Rolfe v. Tufts*, 216 Mass. 563, 566.

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If the landlord repairs the floor of a platform and then expressly assures the tenant that it is safe, this creates no liability for a defective railing;<sup>176</sup> and, in general, the fact that the landlord voluntarily repairs certain defects, does not impose upon him any liability for subsequent injuries from the similar or other defects.<sup>176</sup>

§ 200. Duty of tenant.—In general, in the absence of express covenant, a tenant is not bound to make all repairs; but he must make such repairs as are made necessary by his own acts, and such as are required to keep the premises in habitable condition.<sup>177</sup> For there is always, as we shall see,<sup>178</sup> an agreement implied on the part of the tenant to use the premises in a tenant-like manner, and to redeliver them to the landlord without substantial deterioration from the condition in which the tenant received them, due to the tenant's acts or negligence.<sup>179</sup>

A tenant for years, being liable for permissive waste, is therefore bound to keep the premises wind and water tight; to keep up fences, and to mend doors and windows. In the case of a furnished house he must leave it clean and in good order.<sup>180</sup> But he is not liable for ordinary wear and tear;<sup>181</sup> nor is he bound to do painting, papering or other matters of decoration;<sup>182</sup> nor to repair a defective step in a back stairway.<sup>182a</sup> It is sometimes supposed that the landlord is to make all outside, and the tenant all inside repairs; but there is no such rule of law, and in the ab-

<sup>176</sup> *Galvin v. Beals*, 187 Mass. 250.

<sup>178</sup> *McKeon v. Cutter*, 156 Mass. 296; *Galvin v. Beals*, 187 Mass. 250; *Phelan v. Fitzpatrick*, 188 Mass. 237.

<sup>177</sup> 1 *Parsons on Contracts*, 9th ed., 542; 1 *Washb., Real Prop.*, 6th ed., §§ 670, 686; 1 *Taylor, Landl. & Ten.*, 9th ed., § 343; *U. S. v. Bostwick*, 94 U. S. 53. He is entitled to cut a reasonable quantity of the wood on a farm with which to make such repairs. *Hubbard v. Shaw*, 12 Allen, 120. See *infra*, § 202.

<sup>178</sup> *Infra*, § 202.

<sup>179</sup> 1 *Wood, Landl. & Ten.*, 2d ed., 696; 1 *Taylor, Landl. & Ten.*, 9th ed., § 343; *U. S. v. Bostwick*, 94 U. S. 53, 66, per Waite, C. J. But if there be an express covenant to repair, any implied covenant is thereby excluded. *Supra*, § 186.

<sup>180</sup> 1 *Taylor, Landl. & Ten.*, 9th ed., § 343.

<sup>181</sup> *Torriano v. Young*, 6 C. & P. 8.

<sup>182</sup> *Wise v. Metcalf*, 10 B. & C. 299.

<sup>182a</sup> *Mills v. Swanton*, 222 Mass. 557.

sence of a local custom known to both parties, no such liability.<sup>183</sup>

A tenant at will, who occupies part of a building, the landlord occupying the other part, is liable for the destruction by fire of the part in the possession of the landlord and its contents, caused by the negligence of himself or his servants.<sup>184</sup> But he is not liable for the destruction by a fire used for heating purposes of the part let to himself, if the burning is not intentional and the negligence not enough to amount to recklessness, for it is permissive waste, and a tenant at will is not liable for such waste.<sup>185</sup>

These principles have been set forth as follows: "The law of negligence has been largely developed in recent times, and it is argued that there is no sound reason why it should not be applied in the same manner to real property as to personal, and to tenancies at will as well as to tenancies for a term. It may well be doubted whether the existing condition of the law of negligence is altogether satisfactory, and whether it would be wise to establish an unlimited liability to his landlord on the part of every tenant at will of real property, for every injury occasioned by any act of negligence of himself or his servants in the use of the property. However this may be we do not feel at liberty to overturn long established rules of law governing real property. . . . We are not in this case required to consider the consequence of the negligent setting or guarding of fires set for other purposes than such as are necessary to render the tenement fit for occupation, and in other places than those constructed or intended for the use of fires in heating the premises let. . . . Disregarding the use of fire in clearing land and for other agricultural purposes and confining ourselves to the case at bar, which is the use of fire in stoves for the purpose of heating the building, it is manifest that in many cases prudence might require a reconstruction of the chimneys and the purchase of new stoves. . . . We think the reasonable rule is, that, if landlords would protect themselves from the mere negligence of their tenants, they should take a written lease with proper covenants;

<sup>183</sup> Such a provision was mentioned in *Marley v. Wheelwright*, 172 Mass. 530.

<sup>184</sup> *Lothrop v. Thayer*, 138 Mass. 466 (negligent use of kerosene and stoves by servants of tenant).

<sup>185</sup> *Ibid.* See *infra*, § 202.

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and that a tenant at will is not liable to his landlord for the mere negligence of himself or his servants in kindling or guarding fires in stoves or chimneys for the purpose of heating the premises; but that he is liable for wilful burning and also for such gross negligence as amounts to reckless conduct.”<sup>186</sup>

§ 201. Custom as to repairs.—In one case, it was held that evidence was admissible to show that there is a custom in Boston by which, when a single family house is let to a tenant at will, the landlord is to make the outside repairs including those of the roof, gutters and conductors.<sup>187</sup> Query, however, whether any such custom does exist.

But a custom or usage can never be admitted to control or vary the terms, or the legal effect of a contract expressing in clear terms the intention of the parties.<sup>188</sup>

Nor can usage be allowed to subvert the settled rules of law. Therefore, a custom is inadmissible to subvert the law as to the rights and ‘obligations arising between landlord and tenant.’<sup>189</sup>

§ 202. Implied covenant of lessee to use in a tenant-like manner; waste.<sup>189</sup>—Apart from any express covenant, there is always a covenant implied on the part of a lessee that he will use the premises in a tenant-like manner.<sup>190</sup>

Waste is of two sorts; *permissive*, when it results from a mere omission or negligence on the part of the tenant, and *voluntary*, resulting from “a positive, unreasonable act of a kind likely to cause injury to the [landlord’s] property.”<sup>191</sup>

<sup>186</sup> Field, J., in *Lothrop v. Thayer*, 138 Mass. 466.

<sup>187</sup> *Shute v. Bills*, 191 Mass. 433.

<sup>188</sup> *Guild v. Sampson*, 232 Mass. 509, 514; *Cesena v. Johnson*, 232 Mass. 444, 448.

<sup>189</sup> *Conahan v. Fisher*, 233 Mass. 234, 242; *Bergeron v. Forest*, 233 Mass. 392, 400.

<sup>190</sup> See Express Covenant as to Waste, *supra*, § 109; Covenant as to Redelivery, *supra*, §§ 71–74; Remedy in Tort and Waste, *infra*, §§ 274–276. Also Repairs, *supra*, §§ 198–201. Cp. Crops and Emblements, *infra*, §§ 209–211, and Fixtures, *infra*, §§ 212–221. As to actions of waste, see G. L., c. 242, §§ 1, 2.

<sup>191</sup> 1 Wood, *Landl. & Ten.*, 2d ed., 696; 1 Taylor, *Landl. & Ten.*, 9th ed., § 343; *U. S. v. Bostwick*, 94 U. S. 53, 65, 66, per Waite, C. J.

<sup>191</sup> Knowlton, J., in *Chalmers v. Smith*, 152 Mass. 561, 564; 1 Washb., *Real Prop.*, 107; *U. S. v. Bostwick*, 94 U. S. 53; *Co. Lit.* 53.

See Pub. St. Glossary, p. 1297.

*Historical.* In England a change in the nature of the property or in

"*Permissive* waste consists in the mere neglect or omission to do what will prevent injury; as to suffer a house to go to decay for the want of repair. And it may be incurred in respect to the soil as well as to the buildings, trees, fences, or live stock on the premises."<sup>192</sup>

"*Voluntary* waste consists in the commission of some destructive act; as, in pulling down a house or ploughing up a flower-garden."<sup>193</sup>

Changing the use and condition of land, as from meadow to tillage, or the like, is not waste, nor is the erection of a new house thereon, nor the opening of a way of convenience, nor the putting in of drains. Neither is the raising of the grade of land by putting earth upon it waste, unless prejudicial to the inheritance or the reversioner or remainder-man.<sup>194</sup>

A tenant has also the right to cut a reasonable quantity of wood on a farm for fires,<sup>195</sup> to make repairs,<sup>196</sup> or for incidental uses on the premises, *e. g.*, posts.<sup>197</sup> "But this right of taking wood is a very restricted one. It is merely a right to take

the course of husbandry may be waste, even though it benefit the lessor, but "in this country it is difficult to imagine any exception to the general rule of law, that no act of a tenant will amount to waste, unless it is or may be prejudicial to the inheritance or to those entitled to the reversion or remainder." Wilde, J., in *Pyncheon v. Stearns*, 11 Met. 304, 312.

"At common law a tenant for life, or for years or at will, was not liable for waste, but tenants for life or years were made liable by the statute of Marlebridge, 52 Hen. III., c. 23, and by the statute of Gloucester, 6 Edw. I., c. 5; 2 Inst. 144, 299; Co. Lit. 53a, 53b; *Sackett v. Sackett*, 8 Pick. 309. A tenant at will was not within these statutes, and it was held that, although a tenant at will might be liable to his landlord in an action of trespass for voluntary waste, no action would lie for permissive waste. Co. Lit. 57a, note. *Daniels v. Pond*, 21 Pick. 367. Our statutes give an action of waste or of tort in the nature of waste against a tenant in dower, by the courtesy or for life or years, but not against a tenant at will. Pub. St., c. 179, §§ 1, 3." Field, J., in *Lothrop v. Thayer*, 138 Mass. 466, 472.

<sup>192</sup> Bouv. Law Dict.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Pyncheon v. Stearns*, 11 Met. 304; *Conner v. Shepard*, 15 Mass. 164, 166. A failure on the part of a life tenant to pay taxes is waste, *Stetson v. Day*, 51 Me. 434; but a failure to insure is apparently not waste, *Harrison v. Pepper*, 166 Mass. 288.

<sup>195</sup> *Padelford v. Padelford*, 7 Pick. 152; *Phillips v. Allen*, 7 Allen, 115; *White v. Cutler*, 17 Pick. 248.

<sup>196</sup> *Hubbard v. Shaw*, 12 Allen, 120; *Hapgood v. Blood*, 11 Gray, 400.

<sup>197</sup> *Padelford v. Padelford*, 7 Pick. 152.



wood to be used and consumed upon the estate. The cutting of wood for sale to be used elsewhere is not permitted,"<sup>198</sup> and a tenant of two estates cannot cut wood upon one to be used on the other.<sup>199</sup> Even though the estate was pasture land when the tenant acquired it, and though it is good husbandry to cut off timber growing upon it thereafter and to restore it to a state of cultivation, the general rule applies that the tenant cannot cut wood "for purposes other than the use of the estate for timber and fuel."<sup>200</sup>

"The mere ordinary use of a woodlot, in the manner usually practised by the owner of a farm for supplying his own fires, may be justified in the absence of any express notice forbidding the same. The well known and existing usages as to the mode of carrying on a farm to which a woodlot is attached, both as to the cutting of suitable wood for fires and of timber for repairing fences, are not to be overlooked, and they may furnish sufficient justification for such acts."<sup>201</sup>

The tenant cannot therefore cut and sell valuable timber trees;<sup>202</sup> and, if he brings firewood from elsewhere for his own use, he waives his claim for the time being to be supplied from the land. He cannot, therefore, claim to deduct the value of firewood brought on to the place from the damages occasioned by his sale of timber from the estate,<sup>203</sup> and the fact that a new growth of timber has arisen after the cutting is no answer to a claim of interest on the value of the wood and timber cut.<sup>204</sup>

If buildings, trees, etc., on the premises, are destroyed by storm, fire from lightning, or other *vis major*, this is not waste.<sup>205</sup> But destruction by fire due to the negligence of the tenant is permissive waste, for which tenants for years are liable.<sup>206</sup>

<sup>198</sup> Phillips v. Allen, 7 Allen, 115, 117, per Dewey, J. (case of life tenant); White v. Cutler, 17 Pick. 248; Cook v. Cook, 11 Gray, 123; Clark v. Holden, 7 Gray, 8.

<sup>199</sup> Cook v. Cook, 11 Gray, 123.

<sup>200</sup> Clark v. Holden, 7 Gray, 8, 11, per Shaw, C. J.

<sup>201</sup> Dewey, J., in Hapgood v. Blood, 11 Gray, 400, citing Page v. Robinson, 10 Cush. 102.

<sup>202</sup> Page v. Robinson, 10 Cush. 102.

<sup>203</sup> Phillips v. Allen, 7 Allen, 115; Padelford v. Padelford, 7 Pick. 152.

<sup>204</sup> Phillips v. Allen, 7 Allen, 115.

<sup>205</sup> Co. Lit. 53 a.

<sup>206</sup> Co. Lit. 53 b; Lothrop v. Thayer, 138 Mass. 466.



Alterations made by the tenant ordinarily sufficient to amount to waste do not constitute waste if the landlord assents to them.<sup>207</sup>

For the violation of an express covenant against waste the tenant is liable either in tort in the nature of an action of waste,<sup>208</sup> or in contract for breach of covenant.<sup>209</sup>

§ 203. **Mortgaged land**—Property let to tenants is so often mortgaged, that a few of the cases on waste as between mortgagors and mortgagees may be instructive. A mortgagee of land, even though not in possession, may maintain replevin or an action of tort in the nature of trover, and retake any part of the realty, such as timber or fixtures, wrongfully severed and converted into personalty by the mortgagor, or its value.<sup>210</sup> But acts of the mortgagor in cutting wood and timber, or otherwise severing parts of the realty, are not wrongful, when from the circumstances of the case, the assent of the mortgagee may be reasonably presumed.<sup>211</sup> “Usually, in this state, the mortgage contains a provision that the mortgagor may retain possession until condition broken. The object of this is that the mortgagor may have the use and enjoyment of his property, and it implies a license to use it in the same manner as such property is ordinarily used, and as will not unreasonably impair the adequacy of the security. If a mortgage be of a dwelling-house, the mortgagor may do many acts, such as acts of repair or alteration, which may involve the removal of parts of, the realty which would not be wrongfully within the license implied from the relations of the parties. If a farmer mortgages the whole or a part of his farm with a clause permitting him to retain possession . . . it is within the contemplation of the parties that he is to carry on his farm in the usual manner, and a license to do so is implied. In such case it is clear that he is entitled to take the annual crops and wood for fuel,<sup>212</sup> and we do not think that

<sup>207</sup> *Pfister & Vogel Co. v. Fitzpatrick Shoe Co.*, 197 Mass. 277.

<sup>208</sup> See *infra*, § 276.

<sup>209</sup> *Brown v. Magorty*, 156 Mass. 209; *Wall v. Hinds*, 4 Gray, 256, 270.

<sup>210</sup> *Searle v. Sawyer*, 127 Mass. 491, 493; *Page v. Robinson*, 10 Cush. 99 (cutting wood and selling it); *Cole v. Stewart*, 11 Cush. 181 (removal of building by agent of mortgagor). *Cp. Riley v. Boston Water Power Co.*, 11 Cush. 11 (earth removed and sold).

<sup>211</sup> *Page v. Robinson*, 10 Cush. 99; *Searle v. Sawyer*, 127 Mass. 491.

<sup>212</sup> *Woodward v. Pickett*, 8 Gray, 617.

the implied license is necessarily limited to the annual crops, but that it extends to any acts of carrying on the farm which are usual and proper in the course of good husbandry. If in carrying on similar farms, it is usual and is good husbandry to cut and carry to market wood and timber to a limited extent, a license to do this might be implied from the relation of the parties."<sup>213</sup> So, a mortgagee in possession, but before foreclosure, can maintain an action on the case in the nature of waste against a tenant for life, for waste committed before he took possession.<sup>214</sup> But he is not liable on the redemption of the estate, after foreclosure, for acts of waste done on the estate by his tenant, provided such tenant was a proper person to whom to rent the estate and he had no knowledge of the waste.<sup>215</sup>

§ 204. Remedies for waste.—Every tenant, whether for years or at will, is, as we have seen above, under an implied agreement "to use the premises in a tenant-like manner, and not by his voluntary acts unnecessarily to injure them;" and for a violation of this implied agreement he is liable either in contract or in tort in the nature of trespass *quare clausum*.<sup>216</sup> "While this agreement does not include an obligation on the part of a tenant at will to repair defects resulting from the action of the elements, or from an unavoidable accident, it creates a liability in an action of contract for a wrongful act in violation of it."<sup>217</sup>

The acceptance of rent by the landlord for the full term is not necessarily a waiver of the right to recover damages for breach of this contract. Whether the landlord waives his right to maintain trespass *quare clausum* by permitting the tenant to occupy the premises and by accepting rent for a long time after the acts of waste, *quære*.<sup>218</sup> But where a landlord consents to alterations by the tenant, which might

<sup>213</sup> Morton, J., in *Searle v. Sawyer*, 127 Mass. 491.

<sup>214</sup> *Fay v. Brewer*, 3 Pick. 203 (cutting trees).

<sup>215</sup> *Hubbard v. Shaw*, 12 Allen, 120.

<sup>216</sup> *Chalmers v. Smith*, 152 Mass. 561 (overweighting of a barn, thereby causing it to fall); *United States v. Bostwick*, 94 U. S. 53, 66; *Daniels v. Pond*, 21 Pick. 367; *Lothrop v. Thayer*, 138 Mass. 466, 473; *Page v. Robinson*, 10 Cush. 99; *Re Kelly Dry-Goods Co.*, 102 Fed. Rep. 747. See *infra*, §§ 274-276.

<sup>217</sup> *Chalmers v. Smith*, 152 Mass. 561, 564, per Knowlton, J.

<sup>218</sup> *Chalmers v. Smith*, 152 Mass. 561.

amount to waste but for such consent, he cannot later claim that they are waste and ask to have the premises restored to their original condition.<sup>219</sup>

A tenant is liable for waste, whether committed by himself or by a stranger.<sup>220</sup>

As we have seen above, a tenant at will who commits voluntary waste, thereby terminates his right as tenant, and the landlord is entitled to treat him as a trespasser in doing it.<sup>221</sup> But a tenant at will is not liable for permissive waste either at common law,<sup>222</sup> or under the statutes of this Commonwealth.<sup>223</sup> Thus, for example, a tenant at will is not liable for the burning of a building occasioned by his keeping negligently a fire therein;<sup>224</sup> though if the negligence were so gross as to amount to reckless conduct, it seems he might be liable.<sup>225</sup>

In addition to the remedies at law, the landlord may have an injunction in equity in a proper case to restrain the tenant from committing waste. This is frequently the most effective remedy to be had, as it prevents damage which may be irreparable if once accomplished.<sup>226</sup>

Sometimes a clause is inserted in a lease that the tenant shall not be liable for waste, or as the phrase is shall have the land "without impeachment of waste."<sup>227</sup> This is now held to give the lessee only the privileges of a prudent owner in fee.<sup>228</sup>

The covenant against waste is not the proper basis of an action against the tenant for an injury to the reversion in the lawful removal of fixtures.<sup>229</sup>

§ 205. Estoppel to deny landlord's title—In general, a tenant, whether for years, at will, or at sufferance, is es-

<sup>219</sup> *Pfister & Vogel Co. v. Fitzpatrick Shoe Co.*, 197 Mass. 277. *Cp. Perry v. Mott Iron Works Co.*, 206 Mass. 501.

<sup>220</sup> *Fay v. Brewer*, 3 Pick. 203; *Co. Lit.* 54 a; 4 Kent Com. 77.

<sup>221</sup> *Supra*, § 178. *Chalmers v. Smith*, 152 Mass. 561; *Lothrop v. Thayer*, 138 Mass. 465, 473; *Daniels v. Pond*, 21 Pick. 367; *Starr v. Jackson*, 11 Mass. 519; *Lienow v. Ritchie*, 8 Pick. 235.

<sup>222</sup> *Co. Lit.* 57 a, *note*; *Harnett v. Maitland*, 16 M. & W. 256; *Daniels v. Ponds*, 21 Pick. 367; *Lothrop v. Thayer*, 138 Mass. 466, 473.

<sup>223</sup> *Lothrop v. Thayer*, 138 Mass. 466, 473. See *infra*, § 274.

<sup>224</sup> 4 Kent Com. 81; *Lothrop v. Thayer*, 138 Mass. 466, 474.

<sup>225</sup> *Lothrop v. Thayer*, 138 Mass. 466, 476, per Field, J.

<sup>226</sup> See *infra*, § 271.

<sup>227</sup> *Co. Lit.* 220 a.

<sup>228</sup> 1 Taylor, Landl. & Ten., 9th ed., § 355.

<sup>229</sup> *Wall v. Hinds*, 4 Gray, 256, 270.

topped by the relation of his tenancy to dispute his landlord's title.<sup>230</sup>

This principle has been expressed as follows: "The tenant cannot escape his obligations by showing that his landlord had no title; nor can the landlord escape from his obligations by showing the same thing. The obligations of the tenant to his landlord and of the landlord to his tenant, are reciprocals; and they depend upon the existence of that relation and not upon the validity of the landlord's title."<sup>231</sup> And again: "It is a well settled rule of law that the tenant shall not controvert the title of his landlord; he shall not call in question the right of him by whose permission he occupies. And though it has been said to be a technical rule, it is founded in convenience, and its tendency is to prevent fraud, to facilitate the letting of estates, and to encourage honesty and good faith between landlord and tenant."<sup>232</sup>

The same principle of course applies where, after the expiration of a lease the tenant continues to occupy as tenant at will, and has never renounced his landlord's title.<sup>232a</sup>

The tenant is also estopped to dispute any right of the landlord properly incidental to such ownership. Thus, he is estopped to deny the right of the landlord to bring summary process under the statute, and, if there be two lessors, their right to join in such an action.<sup>233</sup> So, he cannot dispute the

<sup>230</sup> 1 Greenl. Ev., §§ 24, 25; 2 Taylor, Landl. & Ten., 9th ed., § 629; Cobb v. Arnold, 8 Met. 398; Bailey v. Kilburn, 10 Met. 176; Benedict v. Morse, 10 Met. 223, 228; Miller v. Lang, 99 Mass. 13; Morse v. Goddard, 13 Met. 177; Zeller's Lessee v. Eckert, 4 How. (U. S.) 295; Hawes v. Shaw, 100 Mass. 187; Coburn v. Palmer, 8 Cush. 124; Towne v. Butterfield, 97 Mass. 105; Codman v. Jenkins, 14 Mass. 93, 95; Watertown v. White, 13 Mass. 481; Binney v. Chapman, 5 Pick. 124; George v. Putney, 4 Cush. 351, 354; Holbrook v. Young, 108 Mass. 83; Gage v. Campbell, 131 Mass. 566; Holmes v. Turner's Falls Co., 142 Mass. 590, 594; Granger v. Parker, 137 Mass. 228; Merrill v. Bullock, 105 Mass. 486, 490; Boston v. Binney, 11 Pick. 1, 8; McNamara v. Dorey, 219 Mass. 151; Green v. Hammond, 223 Mass. 318; Marion St. Garage Co. v. Sugden, 229 Mass. 130, 134; Aguglia v. Cavicchia, 229 Mass. 263, 266. Cp. Durgin v. Busfield, 114 Mass. 493, 495.

<sup>231</sup> Per C. Allen, J., in Lindsey v. Leighton, 150 Mass. 285, 287.

<sup>232</sup> Hubbard, J., in Cobb v. Arnold, 8 Met. 398.

<sup>232a</sup> Curtis v. Goodwin, 232 Mass. 538.

<sup>233</sup> Oakes v. Munroe, 8 Cush. 282; Coburn v. Palmer, 8 Cush. 124. Cp. *infra*, § 302.

authority of one who acts as agent of the landlord to take possession of the leased premises.<sup>234</sup> Similarly, a tenant under a demise from "A attorney to C," not having been disturbed in occupation by C or any one else, cannot object in an action for rent by an assignee of the lease, that it is void because not the lease of C.<sup>235</sup>

And, in general, "When a tenant is compelled to admit a title in the landlord under whom he occupies as tenant at will, he must be held to admit this not merely as authorizing the landlord to collect rent or compensation for use and occupation, but also as *prima facie* authorizing the landlord to do those acts which the owner of the property may lawfully do, among which is the right to terminate an estate at will by a conveyance of the property. If it is otherwise, the burden of showing this should be on the tenant."<sup>236</sup>

The rule applies although the title of the lessor be only that of a tenant at will,<sup>237</sup> and continues even after the expiration of a lease under which the tenant holds.<sup>238</sup> It holds good "in every form of action by which the lessor may seek to assert the rights reserved or promised to him in the lease."<sup>239</sup>

§ 206. When the estoppel does not operate.—After the expiration of the term, or after the tenant has surrendered his possession to the landlord, or there has been an eviction by the owner of a title paramount to that of the lessor, the estoppel ceases to operate.<sup>240</sup> "It seems to be well settled that if a lessee under a defective title is disturbed by a party having the paramount title, he is not restrained by his lease from purchasing the paramount title without the consent of his

<sup>234</sup> Bailey v. Kilburn, 10 Met. 176.

<sup>235</sup> Kendall v. Carland, 5 Cush. 74.

<sup>236</sup> Devens, J., in Streeter v. Ilsley, 147 Mass. 141.

<sup>237</sup> Hilbourn v. Fogg, 99 Mass. 11; Coburn v. Palmer, 8 Cush. 124; Palmer v. Bowker, 106 Mass. 317. The tenant may therefore show that a subsequent written lease from the landlord to one who has sued the tenant for use and occupation is void. Palmer v. Bowker, 106 Mass. 317.

<sup>238</sup> Gray, J., in Miller v. Lang, 99 Mass. 13; Zeller's Lessee v. Eckert, 4 How. (U. S.) 295; Binney v. Chapman, 5 Pick. 124.

<sup>239</sup> Gray, J., in Hilbourn v. Fogg, 99 Mass. 11, 12; Coburn v. Palmer, 8 Cush. 124; Towne v. Butterfield, 97 Mass. 105.

<sup>240</sup> Miller v. Lang, 99 Mass. 13; Towne v. Butterfield, 97 Mass. 105; George v. Putney, 4 Cush. 351; Holbrook v. Young, 108 Mass. 83; Shaw, C. J., in Coburn v. Palmer, 8 Met. 124, 126; Boston v. Binney, 11 Pick. 1, 8. Cp. Austin v. Kimball, 167 Mass. 300, and *infra*, § 242.

lessor, although he had not been evicted or ousted. But, in such a case, to avoid liability for rent, the lessee is bound to renounce the lessor's title, and to surrender to him the possession; after which he may bring his action to try his title."<sup>241</sup> The mere fact that the superior landlord has recovered possession, after a verdict for the immediate landlord in a possessory action, does not affect such action, though it may affect the amount to be recovered as rent from the tenant.<sup>242</sup>

So also, "where the landlord has, by his own act, deed or conveyance, put an end to the relation of landlord and tenant,"<sup>243</sup> or where the land has been taken by eminent domain to abate a nuisance,<sup>244</sup> or where the landlord's estate has expired by its own limitation,<sup>245</sup> or has been extinguished by the foreclosure of a mortgage.<sup>246</sup>

In reference to the expiration of the landlord's estate, the court has used the following language: "So far as the estoppel of the tenant to deny his landlord's title is an estoppel *in pais*, it arises out of his having entered into possession under that title at the beginning of the lease, and he does not deny that the landlord had a title at that time by alleging and proving that it had since expired. So far as it is an estoppel by deed, it arises out of the execution of the indenture; and some interest as the tenant admits, having passed by the deed, he is not estopped to show what the quantity and duration of that interest was, and that it expired before the rent accrued, which the landlord now seeks to recover."<sup>247</sup>

It seems, also, that the estoppel does not operate where the tenant has been induced to enter into the relation by the fraud of the landlord, or by mistake.<sup>248</sup>

<sup>241</sup> Wilde, J., in *George v. Putney*, 4 Cush. 351, 355.

<sup>242</sup> *Coburn v. Palmer*, 8 Cush. 124.

<sup>243</sup> *Putnam, J., Binney v. Chapman*, 5 Pick. 124; *Hilbourn v. Fogg*, 99 Mass. 11, 12; *Emmes v. Feeley*, 132 Mass. 346. In *Binney v. Chapman*, however, the tenant, after notice of the adverse title, had made a new agreement to continue to hold of the landlord. See *Lamson v. Clarkson*, 113 Mass. 348.

<sup>244</sup> *O'Brien v. Ball*, 119 Mass. 28, 30.

<sup>245</sup> *Hilbourn v. Fogg*, 99 Mass. 11; *Lamson v. Clarkson*, 113 Mass. 348.

<sup>246</sup> *Ryder v. Mansell*, 66 Me. 167.

<sup>247</sup> *Lamson v. Clarkson*, 113 Mass. 348, per Gray, C. J.

<sup>248</sup> 1 Wood, *Landl. & Ten.*, 2d ed., 493; 2 Taylor, *Landl. & Ten.*, 9th ed., § 707.

§ 207. To whom the estoppel extends.—An estoppel in favor of the landlord runs also in favor of an assignee of his interest,<sup>249</sup> and in an action for rent by the assignee or grantee, the tenant cannot deny the title of the assignor or grantor.<sup>250</sup>

In like manner, a sublessee, whose lessor has assigned his interest in the premises, is estopped to deny the title both of the assignee,<sup>251</sup> and of the original lessor.<sup>252</sup> “The rule that a tenant shall not impeach the title of his landlord is one of convenience, whose tendency is to prevent fraud and to facilitate the letting of estates; and, when the tenant has entered under the plaintiff’s grantor and maintains the possession thus acquired, as well as when he has entered under the plaintiff, it would seem that he should, by proper evidence, bring himself within the exceptions to the rule. The considerations which dictate the rule in favor of the landlord’s title apply the rule with equal force to that of his assignee, and the tenant is not injured when his rights as against the landlord are primarily, at least, made the measure of his rights against the assignee.”<sup>253</sup>

But the tenant may show “when the estoppel is set up by one claiming as assignee of the lessor, that such assignment was ineffectual to pass the lessor’s title;”<sup>254</sup> or that the lessor could not convey a greater estate to another than that which the tenant himself derived from his lease.<sup>255</sup> Thus, for example, a tenant at will whose estate was threatened by one to whom the landlord had given a lease for years, was permitted to show that the landlord himself had no valid lease for years.<sup>256</sup>

<sup>249</sup> *Coburn v. Palmer*, 8 Cush. 124 (transfer by one of two landlords to the other); *Streeter v. Hsley*, 147 Mass. 141.

<sup>250</sup> *Hunt v. Thompson*, 2 Allen, 341; *Granger v. Parker*, 137 Mass. 228; *Kendall v. Carland*, 5 Cush. 74.

<sup>251</sup> *Dunshee v. Grundy*, 15 Gray, 314; *Streeter v. Hsley*, 147 Mass. 141; *Cobb v. Arnold*, 8 Met. 398; *Hilbourn v. Fogg*, 99 Mass. 11.

<sup>252</sup> *Patten v. Deshon*, 1 Gray, 325.

<sup>253</sup> *Devens, J.*, in *Streeter v. Hsley*, 147 Mass. 141, 142.

<sup>254</sup> *Gray, J.*, in *Hilbourn v. Fogg*, 99 Mass. 11, 12.

<sup>255</sup> *Hilbourn v. Fogg*, 99 Mass. 11; *Palmer v. Bowker*, 106 Mass. 317. “In these cases the tenant had assumed the burden of proof and had offered to rebut the estoppel arising from his having entered under the landlord whose assignee or grantee brought the suit.” But they are not inconsistent with the general rule of estoppel. *Streeter v. Hsley*, 147 Mass. 141, *Devens, J.*

<sup>256</sup> *Palmer v. Bowker*, 106 Mass. 317.



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So, where the landlord's estate has been set off on execution and the execution creditor has brought an action against the tenant for use and occupation, the tenant is not estopped to deny the validity of the execution levy.<sup>257</sup>

An assignee from a lessee, who enters and occupies, is estopped in an action for rent to deny the validity of the assignment by the original lessee to him.<sup>258</sup>

§ 208. Where tenant claims to hold under adverse title.—A tenant who renounces his landlord's title at the end of the term, and gives notice of his intention to hold under another title, is not subject to the estoppel in a suit by the former lessor for subsequently accruing rent.<sup>259</sup> Thus, one who entered originally as tenant under a lease from the owner of an equity of redemption, but later took a lease from the equitable assignee of the mortgage, and occupied under the latter lease, is not estopped to deny the title of the first lessor, the lease having expired.<sup>260</sup> So, also, a tenant is not estopped to deny the title of one who claims under a paramount right, as a mortgagee of the lessor under a mortgage made prior to the lease, who has entered for breach of condition, provided the tenant has not attorned to him nor paid him rent.<sup>261</sup>

§ 209. Crops and emblements.<sup>262</sup>—Emblements is the right of a tenant at will, or for any other uncertain term, to take and carry away after his tenancy has ended, such annual products of the land as have resulted from his own care and labor. The term is also applied to the crops themselves.<sup>263</sup> The right does not extend to natural products of the estate which are not the result of the tenant's labor, like trees, grass, etc.<sup>264</sup>

In general, the tenant is the owner of the annual crops produced by his labor;<sup>265</sup> but, if a tenant of land sows a crop

<sup>257</sup> *Pickett v. Breckinridge*, 22 Pick. 297.

<sup>258</sup> *Blake v. Sanderson*, 1 Gray, 332.

<sup>259</sup> *Boston v. Binney*, 11 Pick. 8; *McNamara v. Dorey*, 219 Mass. 151. As to disclaimer, see also *supra*, §§ 120, 169.

<sup>260</sup> *Chamberlain v. Perry*, 138 Mass. 546.

<sup>261</sup> *Holmes v. Turner's Falls Co.*, 142 Mass. 590. See *Hogan v. Harley*, 8 Allen, 525, to the effect that the burden is on the tenant to prove the title of such person. *Cp. Durgin v. Busfield*, 114 Mass. 493.

<sup>262</sup> See *supra*, § 40.

<sup>263</sup> *Bouv. Law Dict.*; 2 Wood, *Landl. & Ten.*, 2d ed., 1369.

<sup>264</sup> *Co. Lit.* 55 b.

<sup>265</sup> *Butterfield v. Baker*, 5 Pick. 522; *Com. v. Galatta*, 228 Mass. 308. "At common law growing crops, which owe their annual existence to the culti-



during the pendency of a real action for its possession, and the demandant recovers judgment, he is entitled to the crop;<sup>266</sup> and, if the tenant enter and take the crop, after execution and possession taken by the demandant under the real action, the demandant is entitled to the value of the crop less the cost of harvesting, but not to exemplary damages.<sup>267</sup>

Similarly, when a mortgagee enters for breach of condition, the mortgagor is not entitled to emblements which he has planted while in possession under the terms of the mortgage;<sup>268</sup> although, in general, while in such possession, the mortgagor would be entitled to them.<sup>269</sup> "If a farmer mortgages the whole or a part of his farm, with a clause permitting him to retain possession . . . it is within the contemplation of the parties that he is to carry on his farm in the usual manner, and a license to do so is implied. In such case it is clear that he is entitled to take the annual crops and wood for fuel, . . . and we do not think that the implied license is necessarily limited to the annual crops, but that it extends to any acts of carrying on the farm which are usual and proper in the course of good husbandry."<sup>270</sup> And where a mortgagee, who has entered to foreclose, employs the mortgagor as his agent to carry on a farm, the mortgagee is entitled to the crops, as against a purchaser of the equity of redemption, who took possession subsequently.<sup>271</sup>

It is apparently an open question whether, "if a mortgagee of a farm after entry for breach of condition and a certificate and record thereof, does not retain actual occupation, but intentionally permits the mortgagor, or any person claiming under him, to occupy and carry on the farm, there is not an implied license to the occupant to use and sell, according to the ordinary course of husbandry, the annual crops, even although a tenancy at will may not be created."<sup>272</sup>

vation of man, are treated as chattels even while annexed to the soil." *Ibid.*, p. 311, per De Courcy, J.

<sup>266</sup> *King v. Fowler*, 14 Pick. 238.

<sup>267</sup> *Ibid.*

<sup>268</sup> *Mayo v. Fletcher*, 14 Pick. 525.

<sup>269</sup> *Searle v. Sawyer*, 127 Mass. 491; *Woodward v. Pickett*, 8 Gray, 617; *Hapgood v. Blood*, 11 Gray, 400. *Cp. supra*, § 203.

<sup>270</sup> *Morton, J.*, in *Searle v. Sawyer*, 127 Mass. 491, 494.

<sup>271</sup> *Porter v. Hubbard*, 134 Mass. 233.

<sup>272</sup> *Porter v. Hubbard*, 134 Mass. 233, 237, per *Field, J.*

The right to emblements exists only where the estate is determined by the landlord, by the act of God, or by operation of law, without the tenant's fault; and rests on the fact that the tenant cannot foresee when his uncertain term will end, and might suffer injustice if he were not allowed to harvest his crops.<sup>273</sup> He is therefore entitled to free ingress and egress to take away the crops when ripe;<sup>274</sup> and, if he is prevented by the landlord, he may have an action of tort in the nature of an action on the case.<sup>275</sup>

So, if a lessee destroys the crops of a tenant at will, a criminal action will lie for wantonly destroying the personal property of another.<sup>276</sup>

Therefore, a tenant at will who terminates his tenancy by his own act or default, is not entitled to emblements.<sup>277</sup> Thus, in one case, B contracted with the plaintiff to cultivate the plaintiff's land, find part of the seed, harvest the crop, and then take one-half of it as a compensation for his labor, and deposit the other half in such place as the plaintiff should direct. Before the crop was harvested B absconded, being insolvent. It was held B had no interest in the crop, and the Court said: "The [contract] may be regarded either as a contract to perform labor on the land of the plaintiff remaining in his own possession, and to receive in pay in produce; or, as a hiring of the land for a term of time, rendering a rent payable in produce. In the former case the contract being entire, to perform the whole labor of cultivating the land and harvesting the crop, no right to a share in the property would vest in the laborer until the labor stipulated for by the contract was completed. In the meantime, the possession being in the plaintiff, the property in the crop must necessarily follow the interest in the land, until by a sale or other contract the property in the produce vests in another. Here, by force of the contract, such property was not to vest until the performance of the stipulated labor. . . . We have already alluded to the rule that neither party shall determine his will to the prejudice of the other. Where, therefore, the will is determined on the part of the lessor, the lessee is entitled

<sup>273</sup> Co. Lit. 55 b, 56 a; 2 Bl. Com. 146; Com. v. Galatta, 228 Mass. 308.

<sup>274</sup> *Ibid.*

<sup>275</sup> Co. Lit. 56 a; Griffiths v. Puleston, 13 M. & W. 358.

<sup>276</sup> Com. v. Galatta, 228 Mass. 308. Cf. G. L., c. 266, § 127.

<sup>277</sup> Chandler v. Thurston, 10 Pick. 205.

to the growing crops by way of emblements, and has a right of ingress or egress for the purpose of taking them. But it is otherwise where the will is determined by the lessee himself. Then the growing crops belong to the lessor." <sup>278</sup>

Where a farm is leased with the provision that the produce, whether growing or harvested, if deposited on the land, shall be liable for the rent, and be at the disposal of the lessor until actual delivery, such produce is liable to attachment as the property of the lessee.<sup>279</sup> So, where rent was payable according to the number of bricks made by the lessee upon the premises, and the lessor had the option to take bricks instead of cash at the market price, it was held that the lessor had no present property in the bricks, nor even a lien upon them, until he had signified his election by actually taking the bricks, and that the right of election ceased with the life of the lessee, for at the instant of death the property was fixed, so that no subsequent act of the lessor could change its character.<sup>280</sup>

"A contract for the sale of growing trees or growing annual crops to be severed from the land by the purchaser, does not convey any interest in the land; and so far as it implies a license to enter upon the land the license may be revoked before it is executed." <sup>281</sup>

In general, the right to crops sown by a tenant vests in his executor.<sup>282</sup>

It may be remarked that a lessee for years is also entitled to the annual crops produced by his labor, but as he is not entitled to the right of emblements, he must remove them, like fixtures or chattels, during the term. The reason of this is that his term being certain, he can tell whether to plant or not, and if he chooses to plant crops which will not ripen within the term, the landlord may justly claim them.<sup>283</sup>

<sup>278</sup> *Chandler v. Thurston*, 10 Pick. 205, pp. 209, 210.

<sup>279</sup> *Butterfield v. Baker*, 5 Pick. 522; *Munsell v. Carew*, 2 Cush. 50; *Heald v. Builders' Ins. Co.*, 111 Mass. 38, 40; *Whitcomb v. Tower*, 12 Met. 487. *Cp.* *Lewis v. Lyman*, 22 Pick. 437, 442, also *supra*, § 40.

<sup>280</sup> *Ex parte Wait*, 7 Pick. 100.

<sup>281</sup> *Hoar, J.*, in *Delaney v. Root*, 99 Mass. 546; *Parsons v. Smith*, 5 Allen, 578; *Giles v. Simonds*, 15 Gray, 441; *Whitmarsh v. Walker*, 1 Met. 313; *Miller v. Baker*, 1 Met. 27. *Cp.* *Clap v. Draper*, 4 Mass. 266.

<sup>282</sup> 1 Taylor, Landl. & Ten., 9th ed., § 536.

<sup>283</sup> *Co. Lit.* 55 a; *Watriss v. Cambridge Bank*, 124 Mass. 571, 575. See *infra*, § 219.

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As to the effect of bankruptcy upon the right to remove crops, see *infra*, § 332.

§ 210. **Manure.**—Manure “made on a farm . . . in the ordinary course of husbandry, consisting of the collections from the stable or barnyard, or of composts formed by an admixture of these with soil or other substances, is, by usage, practice and the general understanding, so attached to, and connected with the realty, that, in the absence of any express stipulation on the subject, an outgoing tenant has no right to remove the manure thus collected.”<sup>284</sup>

“This rule is applied in whatever situation or condition the material is before it is finally expended upon the soil.”<sup>285</sup> But it may be overridden by a special agreement between the landlord and the tenant;<sup>286</sup> and, if there be an agreement making the manure the property of the tenant, it does not become realty though left by the tenant upon the premises at the expiration of the term.<sup>287</sup> Such an agreement, like an agreement for the sale of fixtures, need not be in writing, and is not within the statute of frauds.<sup>288</sup>

On the other hand, where the tenant keeps his own horses in a stable upon the premises, and feeds them with food purchased by himself, he is entitled to the manure as his personal property;<sup>289</sup> and the same is true, in general, wherever manure is made in any manner not connected with agriculture or in a course of husbandry.<sup>290</sup> Therefore, where a tenant has collected upon a farm a greater number of animals than it is capable of supporting, which are fed upon purchased food, for the purpose of carrying on the milk business, it is error to charge that the tenant is not entitled to the whole or any ascertainable part of the manure.<sup>291</sup> But, in particular cases

<sup>284</sup> *Daniels v. Pond*, 21 Pick. 367, per Shaw, C. J.; *Fay v. Muszey*, 13 Gray, 53; *Lewis v. Lyman*, 22 Pick. 437, 444; *Strong v. Doyle*, 110 Mass. 92; *Nason v. Tobey*, 182 Mass. 314.

<sup>285</sup> *Colt, J.*, in *Strong v. Doyle*, 110 Mass. 92.

<sup>286</sup> *Fletcher v. Herring*, 112 Mass. 382; *Strong v. Doyle*, 110 Mass. 92.

<sup>287</sup> *Fletcher v. Herring*, 112 Mass. 382.

<sup>288</sup> *Strong v. Doyle*, 110 Mass. 92. *Cp.* *Brown v. Magorty*, 156 Mass. 209; *Middlesex Co. v. Osgood*, 4 Gray, 447.

<sup>289</sup> *Daniels v. Pond*, 21 Pick. 367; *Fay v. Muszey*, 13 Gray, 53. *Cp.* *Nason v. Tobey*, 182 Mass. 314; *Lewis v. Lyman*, 22 Pick. 437, 442.

<sup>290</sup> *Daniels v. Pond*, 21 Pick. 367, 372, per Shaw, C. J.

<sup>291</sup> *Nason v. Tobey*, 182 Mass. 314.

manure may not belong to the tenant, even though he furnishes the feed.<sup>292</sup>

There is often a special covenant inserted in leases covering the matter of the above rule, as that "the manure shall be spent upon the place,"<sup>293</sup> or that the lessee "will not sell, dispose of, or carry away, or suffer to be carried away from said farm . . . any of the manure which shall be made on said premises, except by written agreement of the lessors."<sup>294</sup> In regard to the remedy of the landlord under such a covenant, the court has used the following language: "the defendant objected that the only remedy of the plaintiff was by an action of tort for the conversion of the manure. An action of tort no doubt would lie; but this does not exclude the maintenance of an action of contract upon the express agreement, and such actions have often been maintained."<sup>295</sup>

§ 211. Sharing of crops.<sup>296</sup>—The interests of the parties, where there is a sharing of crops, depend upon the contract in each case. "In some cases the owner of the land gives up the entire possession, in which event it is a contract in the nature of a lease, with rent payable in kind; in other cases he continues to occupy the premises in common with the other party, or reserves to himself that right, and so a tenancy in common to that extent is created, and each is entitled to the joint possession of the crops, or the possession of one is the possession of the other, until division; or he may retain the sole possession of the land, and the other party may have the right to perform the labor and receive half the crops as compensation, or the two parties may become tenants in common of the growing crops, while no tenancy in common as such exists in the land."<sup>297</sup> . . . If the relation of tenants in common in the land or crops exists between the parties by virtue of their contract, on familiar principles trespass *quare clausum* or *de bonis asportatis* would not lie; and trover for conversion

<sup>292</sup> Nason v. Tobey, 182 Mass. 314; Lewis v. Lyman, 22 Pick. 437, 442.

<sup>293</sup> Brown v. Magorty, 156 Mass. 209.

<sup>294</sup> Heald v. Builders' Ins Co., 111 Mass. 38.

<sup>295</sup> Brown v. Magorty, 156 Mass. 209, per Allen, J., citing Chalmers v. Smith, 152 Mass. 561.

<sup>296</sup> See also *supra*, § 40; as to Joint Parties, *supra*, § 28, and as to Partners, *supra*, § 31.

<sup>297</sup> Warner v. Abbey, 112 Mass. 355, Endicott, J.; Orcutt v. Moore, 134 Mass. 48.

of the share of one party in the crops by the other can be maintained only where there is such destruction, sale, or disposition of the crops by the one, that the other party is precluded by that act from any further enjoyment of it." <sup>298</sup>

In the following cases the parties were held to be tenants in common: (1) Where A leased his farm on which he lived to B by a lease under seal, and each party was to furnish half the necessary seed, B was to sow and plant the tillage land and deliver to A one half of the crops of every kind, properly and seasonably secured in his house-cellar and barn; the corn was to be divided in the ear, and other grain to be threshed and then divided; and B was to have the use of a scaffold in the barn to put his grain upon. They were to occupy the land jointly.<sup>299</sup> (2) Where A orally agreed with B to farm a lot of land upon shares, and that each was to furnish one half of the seed and manure, that A should do the handlabor and B the team work, and that A should harvest the crops which were to be divided equally between them. The action was for the conversion of the whole crop by B.<sup>300</sup>

"But where . . . the owner parts with his entire possession of the land to his lessee or tenant, and is to receive his half by way of rent in kind, the relation of tenants in common does not exist; but it is that of lessor and lessee. The lessor has no right to disturb the lessee in his possession or to interfere with or take his half, for, the possession of the land being in the lessee, the property in the crop must necessarily follow the interest in the land until the time for division. . . . In such case, therefore, the lessee or tenant could maintain trespass *quare clausum* for injury to the possession of real estate, with an aggravation of the same by the taking of personal property, and could equally maintain trespass *de bonis* or trover for the taking of the same property." <sup>301</sup>

<sup>298</sup> Warner v. Abbey, 112 Mass. 355, 360, per Endicott, J.; Delaney v. Root, 99 Mass. 546. Cp. Weld v. Oliver, 21 Pick. 559; Burbank v. Crooker, 7 Gray, 158.

<sup>299</sup> Walker v. Fitts, 24 Pick. 191.

<sup>300</sup> Delaney v. Root, 99 Mass. 546.

<sup>301</sup> Warner v. Abbey, 112 Mass. 355, 360, Endicott, J.; Orcutt v. Moore, 134 Mass. 48; Chandler v. Thurston, 10 Pick. 205; Cornell v. Dean, 105 Mass. 435. Cp. Lewis v. Lyman, 22 Pick. 437; Darling v. Kelly, 113 Mass. 29.

"Contracts of this nature may either be regarded as a lease of the land with a rent payable in a portion of the crop; or as an agreement by one man to work upon the land of another, and to receive a part of the crop as compensation for his labor; or as giving the laborer a qualified interest in the land, not exclusive, and not such as makes him a tenant, but creating a tenancy in common of the growing crops with the owner of the soil, and giving him a right of ingress and regress for the purpose of cultivating and taking away his share. When the terms of the contract will admit of the latter construction, it is preferred; as giving greater security to the rights of both parties."<sup>302</sup>

It follows from the landlord's not being entitled to any interest in the crops until a division, that he need not be joined by the lessee in any action against a third person for a sale of farm produce, pasturage, etc.<sup>303</sup> Similarly, the lessee alone can maintain trespass *quare clausum fregit* for a trespass.<sup>304</sup> The fact that the lessor did not occupy a farm at all is strong evidence that the lessee's occupation is intended to be exclusive.<sup>305</sup> Under a grant of all the trees and timber standing and growing on a close, with liberty at all times to cut and carry away the trees, the grantee may maintain trespass *quare clausum fregit* against the owner of the soil for cutting down the trees.<sup>306</sup>

Where the relation of landlord and tenant exists, and the tenant is entitled to the exclusive possession of the close, the landlord cannot authorize the entry of any third person.<sup>307</sup>

In the following cases it was held that the relation of lessor and lessee might or did exist. (1) Where A was to have exclusive possession of a farm, stock, tools and buildings for a year, except a portion of the house occupied by other tenants of B; A to have entire charge of the farming, and the manner in which it was to be carried on, to keep half the crops, the other half to go to B.<sup>308</sup> (2) Where A agreed orally with B, that B was to carry on the farm on halves, and to leave

<sup>302</sup> Hoar, J., in *Delaney v. Root*, 99 Mass. 546, 549.

<sup>303</sup> *Cornell v. Dean*, 105 Mass. 435 (case of pasturage).

<sup>304</sup> *Darling v. Kelly*, 113 Mass. 29; *Geer v. Fleming*, 110 Mass. 39.

<sup>305</sup> *Orcutt v. Moore*, 134 Mass. 48.

<sup>306</sup> *Clap v. Draper*, 4 Mass. 266.

<sup>307</sup> *Darling v. Kelly*, 113 Mass. 29.

<sup>308</sup> *Warner v. Abbey*, 112 Mass. 355.



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at the end of the term as much hay in the barn as he found there at the beginning.<sup>309</sup> (3) Where A hired of B a farm from year to year on shares, retaining one-half of the proceeds, giving B the other half, and having the exclusive occupation of the farm. The court said that B might be liable for pasturing of his cattle on the land.<sup>310</sup> (4) Where B let land to A, on the terms that B was to manure and plough it, that A was to find seed and to plant, cultivate and harvest the crops; and that the crops after they were harvested were to be divided upon the land, and one-half taken by B for his own use, and the other half taken by him to the house of A. It was held in this case that, if the jury found the plaintiff was entitled to the exclusive possession of the land after it was ploughed and manured, he could maintain an action of trespass *quare clausum* against a stranger, who entered and harvested and took away the crops, though he justified under a license from B.<sup>311</sup>

Where two persons agree to cultivate land on shares, each has a right to go upon the premises, either in person or through an agent, to remove his share of the crops and the other cannot prevent him.<sup>312</sup>

If there are special provisions in regard to the use of farm implements in a sharing of crops, they must of course be complied with. Thus, in one case there was a lease for years of a farm "at halves." The lessor was to stock the farm with one yoke of oxen, sixteen cows and to furnish various farming tools. The lessee agreed to take good care of the stock, to pay interest on one-half its appraised value and one-half the taxes; also "to faithfully return said stock and other personal property in quantity and quality to the said lessor, or the value of the same in money" as the lessee may elect, "said property, if retained, to be appraised by disinterested persons at the close of the contract." The lessee sold some of the stock, purchased other oxen and cows and sold the latter before the termination of the lease. It was held that the lessor might maintain an action of trover against the purchaser of the substituted stock.<sup>313</sup>

<sup>309</sup> *Orcutt v. Moore*, 134 Mass. 48.

<sup>310</sup> *Cornell v. Deane*, 105 Mass. 435.

<sup>311</sup> *Darling v. Kelly*, 113 Mass. 29.

<sup>312</sup> *Commonwealth v. Rigney*, 4 Allen, 316.

<sup>313</sup> *Billings v. Tucker*, 6 Gray, 368.



§ 212. **Fixtures.**<sup>312</sup>—**Definition.**—Fixtures are “personal chattels affixed to real estate, which may be severed and removed by the party who has affixed them or by his personal representative, against the will of the owner of the freehold.”<sup>314</sup> Whether an article has become so affixed to the building as to become a part of it is generally a mixed question of law and fact.<sup>315</sup> “‘Fixtures’ does not necessarily import things affixed to the freehold. The word is a modern one, and is generally understood to comprehend any article which a tenant has the power to remove.”<sup>316</sup>

There may be, therefore, two classes of articles in the possession of a tenant; fixtures and personal chattels. He has the right to remove both while he is tenant, but after he ceases to be tenant the title to fixtures vests in the landlord, while for personal chattels the latter can only charge the tenant storage.<sup>317</sup>

“The term ‘land’ legally includes all houses and buildings standing thereon. Whatever is affixed to the realty is thereby made parcel thereof, and belongs to the owner of the soil . . . things personal in their nature, but prepared and intended to be used with real estate, having been fixed to the realty and used with it, become part of the land by accession, pass with it and belong to the owner of the land. . . . Buildings erected on land of another voluntarily and without any contract with the owner become part of the real estate and belong to the owner of the soil.<sup>318</sup> . . . An exception is admitted to this general rule, where there is an agreement, express or implied, between the owner of the real estate and the proprietor of materials and buildings, that, when annexed to the realty, they shall not become parts of it, but shall still remain the property of the person annexing them. In such case, the law gives effect to the agreement of the parties, and personal property, though affixed to the realty, retains its

<sup>312</sup> As to Manure, see *supra*, § 210.

<sup>314</sup> Bouvier Law Dict.

<sup>315</sup> *Natural Ventilator Co. v. Winslow*, 215 Mass. 462; *Houle v. Abramson*, 210 Mass. 83; *Noyes v. Gagnon*, 225 Mass. 580, 584. Cf. *Rowse*, petitioner, 195 Mass. 216.

<sup>316</sup> Black Law Dict.

<sup>317</sup> See *Furniture and Personal Chattels*, *infra*, § 218.

<sup>318</sup> *Washburn v. Sproat*, 16 Mass. 449; *Leland v. Gassett*, 17 Vt. 403; *Peirce v. Goddard*, 22 Pick. 559. See *infra*.

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original characteristics, and belongs to its original owner. Within this exception are included not only cases where there is an express agreement between the parties, that personal property shall not become real estate by annexation to the soil, but also that large class of cases, which arise between landlord and tenant, in which by agreement, either express or implied, from usage or otherwise, the tenant is allowed to retain as his own property, if seasonably removed, fixtures erected by him for purposes of trade, ornament or ordinary use upon leasehold premises during his tenancy.”<sup>319</sup>

“The original rule of the common law subjected everything that was affixed to the freehold to the law governing the freehold. But the law of fixtures has grown into a system which almost renders the right of removal a general rule, instead of an exception. The ancient rule has been especially relaxed and rendered more liberal, in its application to the relation of landlord and tenant.”<sup>320</sup>

The phrase “landlord’s fixtures” is sometimes used as distinguished from “tenant’s fixtures.” In this sense, “landlord’s fixtures” covers everything annexed to the freehold by the landlord, before the tenant takes possession, or during the tenant’s term,—articles which the tenant is allowed to use but not to remove, and which he must restore at the end of the term. It also covers all things attached to the realty by the tenant in such a manner that they cannot be removed.<sup>321</sup>

§ 213. General principles.—In a leading case upon this subject the court laid down certain principles as settled. “The first and leading one is that the law regards with peculiar favor the rights of tenants, as against their landlords to remove articles annexed to the freehold, and extends much greater indulgence to them in this respect than it concedes to executors, remaindermen or any other class of persons.”<sup>322</sup>

<sup>319</sup> Bigelow, J., in *Sudbury Parish v. Jones*, 8 Cush. 184, 189.

<sup>320</sup> Ames, J., in *Hanrahan v. O'Reilly*, 102 Mass. 201.

<sup>321</sup> 2 Taylor, Landl. & Ten., 9th ed., § 544; 2 Wood, Landl. & Ten., 2d ed., 1228.

<sup>322</sup> *Wall v. Hinds*, 4 Gray, 256, 271, Bigelow, J.; *Gaffield v. Hapgood*, 17 Pick. 192; *Winslow v. Merchants Insurance Co.*, 4 Met. 306; *King v. Johnson*, 7 Gray, 239; *Taylor v. Townsend*, 8 Mass. 411, 416; *Union Bank v. Emerson*, 15 Mass. 159; *Natural Ventilator Co. v. Winslow*, 215 Mass. 462.

*Fixtures as between mortgagor and mortgagee.* “But the case of mort-

"The reason for this is that tenants usually pay to their landlords adequate rent, and it is therefore equitable that they should have the right to remove fixtures which have been put up by them for their own convenience and use, and at their own expense."<sup>323</sup> Therefore, one occupying under a contract to purchase cannot remove fixtures attached by him during such occupation. "The occupant has paid no equivalent for the use and enjoyment of the premises; nor is he compelled to surrender the estate at a fixed period of time, as upon the expiration of a term demised. He can by fulfilling his contract of purchase, become the owner of the estate, and enjoy the full benefit of all the erections and improvements which he has made thereon."<sup>324</sup>

"Another well settled rule is that fixtures, which a tenant is allowed to disannex and take away, are comprehended within two classes, or are of a mixed nature, falling partly within and partaking of the nature of both. These classes are, first, those which are put up for ornament or the more convenient use of the premises, and are called domestic fixtures; second, those which are put up for purposes of trade. The mortgagor and mortgagee stands upon a different footing. The mortgagor, to most purposes, is regarded as the owner of the estate; indeed he is so regarded to all purposes, except so far as it is necessary to recognize the mortgagee as legal owner for the purposes of his security. The improvements, therefore, which the mortgagor remaining in the possession and enjoyment of the mortgaged premises, makes upon them, in contemplation of law he makes for himself and to enhance the general value of the estate, and not for its temporary enjoyment; whereas a tenant, making the same improvements upon the estate of another, with a view to its temporary enjoyment, must be presumed to do it for himself, and not for the purpose of enhancing the value of the freehold." Shaw, C. J., in *Winslow v. Merchants Ins. Co.*, 4 Met. 306, 310; *McLaughlin v. Nash*, 14 Allen, 136; *Butler v. Page*, 7 Met. 42; *Smith v. Bay State Savings Bank*, 202 Mass. 482; *Hood v. Bottom*, 199 Mass. 244.

*Fixtures as between vendor and vendee.* A vendor is in a similar position to a mortgagor. Many articles annexed by him become part of the realty and pass by deed, which would not do so if annexed by a tenant. The question is as to the intention of the owner as manifested by his acts; *Smith v. Bay State Savings Bank*, 202 Mass. 482, 485; *Richardson v. Copeland*, 6 Gray, 536, 538; *McConnell v. Blood*, 123 Mass. 47; *Houle v. Abramson*, 210 Mass. 83.

<sup>323</sup> *Wall v. Hinds*, 4 Gray, 256, 271, Bigelow, J.

<sup>324</sup> Bigelow, J., in *King v. Johnson*, 7 Gray, 239, 241; *Milton v. Colby*, 5 Met. 78.

and are known as trade fixtures. In order to determine whether in any particular case chattels annexed to the freehold come within these classes, so that the tenant has the right to remove them, several considerations are to be regarded. One of the chief of these is the mode of their annexation to the building; that is, whether they are annexed to the fabric of the house, and the extent to which they are so united, and whether they can be removed without substantial injury to the building or to themselves. Another important consideration is the intention with which they were annexed by the tenant and the purposes which they were designed to answer; that is, whether they were intended for a permanent and substantial improvement to the realty . . . or whether they were put up and used for a temporary object or for the more convenient occupation and enjoyment of the premises for the particular purpose for which the tenant used them, so that they were useful and necessary rather to the comfortable and convenient occupation of the building than to the building itself.”<sup>325</sup> The principle has been also stated as follows: “In determining whether an addition made by a tenant to a leased building is removable or not by him during his term, the chief element to be considered is the mode of its annexation, and whether it can be removed without substantial injury to the building or to itself. The intention with which it was put there, though often an element to be considered, is of secondary importance.”<sup>326</sup>

On the other hand, “Whether fixtures placed by a lessee upon leased land thereby become part of the realty is not altogether a matter of agreement between the lessor and lessee. The intention of the latter has much to do with the question, and if his intention is that the fixture shall remain his personal property, and that intention is made known, and his acts are consistent therewith, the fixture may remain his personal property although there may be no agreement to that effect between him and the lessor.”<sup>327</sup>

The nature of the chattel and the intention with which it was placed upon the land, being material matters in deciding whether the article in question is a fixture, are matters of evidence.<sup>328</sup>

<sup>325</sup> Bigelow, J., in *Wall v. Hinds*, 4 Gray, 256, 271.

<sup>326</sup> *Collamore v. Gillis*, 149 Mass. 578, 581, per C. Allen, J.

<sup>327</sup> *Ryder v. Faxon*, 171 Mass. 206, 208, per Barker, J.

<sup>328</sup> 1 Wood, *Landl. & Ten.*, 2d ed., 407; *Noyes v. Gagnon*, 225 Mass. 580, 584.

It has been held that a mortgagee in possession might "take down any buildings erected by him, the materials of which were his own, which were not properly fixtures or so connected with the soil as that they could not be removed without prejudice to it." The Court said: "However rigidly the rights of landlords against their tenants may have been construed in ancient times, it is now settled that in favor of trade, manufactures, and business, buildings erected for those objects may be carried away by those whose estate is determined . . . improvements made by the tenant during his term may be removed by him if he does not thereby prejudice the estate of his landlord."<sup>329</sup>

But the fact that an article is well adapted for use in the business for which the tenant used it (*e. g.*, an ice chest in a tavern), "is of itself quite an immaterial element in determining the nature of the article. Many articles of furniture and other chattels of a purely personal nature are useful and convenient in the prosecution of a particular trade or business, which can in no just sense or as between any classes of persons be deemed to be fixtures."<sup>330</sup>

If fixtures are added to real estate by one who is in possession thereof under a bond for a deed, without paying rent, his right to remove them, after breach of the bond, must be determined by the rule which prevails as between vendor and purchaser or mortgagor and mortgagee, and not that which prevails as between landlord and tenant.<sup>331</sup> Similarly, if fixtures are added after a mortgage of the premises by a tenant at will of the mortgagor, his right to remove them, after entry by the mortgagee, depends upon the rule between mortgagor and mortgagee, not upon the rule as between landlord and tenant.<sup>332</sup> If a tenant makes a mortgage of fixtures which he has annexed, the mortgagee stands, as to the right of removal, in the place of the tenant, and is subject to the

<sup>329</sup> *Taylor v. Townsend*, 8 Mass. 411, 415, per Parker, J.; *Whiting v. Brastow*, 4 Pick. 310.

<sup>330</sup> *Park v. Baker*, 7 Allen, 78, 79, per Bigelow, C. J.

<sup>331</sup> *McLaughlin v. Nash*, 14 Allen, 136; *Hutchins v. Shaw*, 6 Cush. 58; *Murphy v. Marland*, 8 Cush. 575; *King v. Johnson*, 7 Gray, 239; *Butler v. Page*, 7 Met. 42; *Winslow v. Merchants Insurance Co.*, 4 Met. 306; *Pierce v. George*, 108 Mass. 78. *Cp.* *Cooper v. Adams*, 6 Cush. 87; *Weston v. Weston*, 102 Mass. 514.

<sup>332</sup> *Lynde v. Rowe*, 12 Allen, 100.

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same rules and limitations in regard thereto;<sup>333</sup> and the rule is the same in case of a vendee.<sup>334</sup>

If a tenant die during the term, fixtures go to his executor or administrator and not to his heirs; but he may devise them by will.<sup>335</sup>

The statute of frauds does not apply to agreements in regard to fixtures merely annexed to the freehold,<sup>336</sup> either as to what shall be their nature or in regard to their sale.

§ 214. Special agreements as to fixtures.—“When there is a special agreement between landlord and tenant regarding fixtures, that overrules and supersedes the general rules of law regulating their mutual rights and obligations,”<sup>337</sup> “and may be shown by inference from the subsequent recognition of rights which can result only from its existence,” and “by the subsequent admissions and dealings of the parties.”<sup>338</sup> Thus, an agreement by a landlord with a tenant in regard to a bakehouse and oven erected by the latter, that if the tenant “should be taken away or anything should happen, he would take it off his hands at a fair valuation,” and an agreement with the vendee of the tenant that he might remove everything he bought of the tenant, are evidence of a contract to make the house and oven fixtures.<sup>339</sup> So, where the owner of property and the mortgagee had recognized the right of a tenant to remove a building therefrom as personal property, and a purchaser from the owner’s assignees in bankruptcy knew of such an agreement, it was held that the purchaser was bound by it, although the assignees told him that the tenant’s claim was unfounded.<sup>340</sup> But, if a new tenant

<sup>333</sup> *Talbot v. Whipple*, 14 Allen, 177, 182. *Cp. Stone v. Livingston*, 222 Mass. 192.

<sup>334</sup> See *Brown v. Wallis*, 115 Mass. 156.

<sup>335</sup> 2 Taylor, Landl. & Ten., 9th ed., § 549.

<sup>336</sup> *Strong v. Doyle*, 110 Mass. 92.

<sup>337</sup> *Wall v. Hinds*, 4 Gray, 256, 273, Bigelow, J.; *Sudbury Parish v. Jones*, 8 Cush. 184. *Cp. Burk v. Hollis*, 98 Mass. 55; *Fletcher v. Herring*, 112 Mass. 382; *Hood v. Hartshorn*, 100 Mass. 117; *Trask v. Little*, 182 Mass. 8.

<sup>338</sup> *Morris v. French*, 106 Mass. 326; *Howard v. Fessenden*, 14 Allen, 124; *Korbe v. Barbour*, 130 Mass. 255. See *Gibbs v. Estey*, 15 Gray, 587; *Sudbury Parish v. Jones*, 8 Cush. 184; *Murphy v. Marland*, 8 Cush. 575; *Shaw v. Carbrey*, 13 Allen, 462; *Searle v. Bishop of Springfield*, 203 Mass. 493, 496.

<sup>339</sup> *Korbe v. Barbour*, 130 Mass. 255.

<sup>340</sup> *Morris v. French*, 106 Mass. 326.

enters without any notice of such an agreement, he is entitled to hold the demised premises as against a prior lessee.<sup>341</sup>

Even an express covenant to deliver up in good order "all future erections or additions" to or upon the premises, "is limited in purpose and effect to new buildings erected or old buildings added to—putting such erections and additions upon the same footing in respect of the obligation to keep in repair as the buildings upon the premises at the time of the execution of the lease; and cannot be extended so as to deprive the tenants of the right to remove trade fixtures . . . put by them upon the property."<sup>342</sup>

§ 215. What are fixtures.<sup>343</sup>—There have been numerous decisions as to what are fixtures.<sup>344</sup> (1) A cistern resting upon the floor of an attic; water pipes leading to various sinks, and terminating in faucets tacked to boards nailed to the walls, which were fastened to the walls by hooks driven in and passed through holes cut in flooring and partitions, which were cut to put the pipes in and not filled up when they were taken away; sinks fastened to the floor with nails and set into the floor by cutting the board away; waste water pipes passing through holes in the floors; gas pipes fastened to the walls by metal bands and passing through holes in the walls, and in some rooms through ornamental centre pieces of wood in the ceiling which were cut through for their removal.<sup>345</sup> (2) Buildings, the materials of which belong to the tenant and which can be removed without prejudice to the soil.<sup>346</sup> (3) The padlock to a corn house and boards for putting corn in bins which had never been fastened to the house.<sup>347</sup> (4) A fire frame fixed in a common fire place, with brick laid in between the sides of the fire frame and the jambs of the fire

<sup>341</sup> *Trask v. Little*, 182 Mass. 8. *Cp. Hanrahan v. O'Reilly*, 102 Mass. 201, cited *infra*, § 221.

<sup>342</sup> *Holbrook v. Chamberlain*, 116 Mass. 155, 162, per Gray, C. J. *Cp. Houle v. Abramson*, 210 Mass. 83.

As to how far a covenant as to redelivery in good order obliges a tenant to remove fixtures annexed with the consent of the landlord, see *supra*, § 73.

<sup>343</sup> As to Manure, see *supra*, § 210.

<sup>344</sup> *Cp. Mass. Digest as to Fixtures as between Mortgagor and Mortgagee, Grantor and Grantee, Heir and Executor, etc.*; also *supra*, § 213.

<sup>345</sup> *Wall v. Hinds*, 4 Gray, 256, citing as to grates and gas fixtures; *Elliott v. Bishop*, 10 Exch. 512.

<sup>346</sup> *Taylor v. Townsend*, 8 Mass. 411. See *infra*, § 217.

<sup>347</sup> *Whiting v. Brastow*, 4 Pick. 310.



place.<sup>348</sup> (5) Trees and shrubs on land leased for a nursery garden.<sup>349</sup> (6) Platform scales, set in an excavation in a highway and extending under a building upon adjoining land and up into a room to which that part of the scales by which the weight is ascertained is firmly fixed.<sup>350</sup> (7) Bowling alleys with their usual appurtenances, erected by a tenant with the consent of the landlord and "for the purpose of profit" in a room leased "for hall purposes," even though they are nailed to the floor and the drawing of nails will do some injury to the building.<sup>351</sup> (8) Chimney pieces, wainscot, grates, furnaces, cider-mills, buildings resting on blocks.<sup>352</sup> (9) A wooden icehouse, large enough to hold upwards of 2000 tons of ice, built upon no foundations except a wooden block under each corner of the sills, which are set into the ground upon a layer of charcoal, at a depth varying with the surface of the land from six inches to three feet, and banked on the outside with soil to prevent the air from circulating under them.<sup>353</sup> (10) Counter-shafting, pulleys, hangers and belts, though fastened to a building; also a portable boiler and steam pipes supported by hooks attached to the building.<sup>354</sup> (11) Two counters bought by the tenant for restaurant purposes; one called an oyster and trench counter, ten or twelve feet long and two or three feet wide, brought into the room entire and nailed to the floor and afterward enlarged by an addition of about the same size nailed to the floor; the other, called a bar, twenty-two feet long and two feet wide, brought into the room entire and fastened to the floor with nails and angle irons.<sup>355</sup> (12) Marble and imitation marble slabs fastened to brackets screwed into the walls.<sup>356</sup> (13) A small wooden house standing upon blocks and capable of being removed.<sup>357</sup> (14) A machine of iron and steel of

<sup>348</sup> *Gaffield v. Hapgood*, 17 Pick. 192.

<sup>349</sup> *Miller v. Baker*, 1 Met. 27; *Whitmarsh v. Walker*, 1 Met. 313.

<sup>350</sup> *Bliss v. Whitney*, 9 Allen, 114.

<sup>351</sup> *Hanrahan v. O'Reilly*, 102 Mass. 201.

<sup>352</sup> *Per Ames, J.*, in *Hanrahan v. O'Reilly*, 102 Mass. 201.

<sup>353</sup> *Antoni v. Belknap*, 102 Mass. 193.

<sup>354</sup> *Holbrook v. Chamberlain*, 116 Mass. 155.

<sup>355</sup> *Guthrie v. Jones*, 108 Mass. 191.

<sup>356</sup> *Weston v. Weston*, 102 Mass. 514.

<sup>357</sup> *Shepard v. Spaulding*, 4 Met. 416; *McIver v. Estabrook*, 134 Mass. 550, 554.



the weight of six tons, placed on a stone and mortar foundation in the cellar of a building, and extending up into the second story thereof, with the first floor fitted close around the bottom of its frame, and braced and bolted to various parts of the building, and so constructed that it cannot be removed from the building without being taken to pieces and taking up the floor and cutting into the walls and sides of the building.<sup>358</sup> (15) A wooden building fastened to the ground by numerous iron bolts passing through the lower timbers into rocks in the ground, and so constructed that it can be removed without a large expense for strengthening it, having a brick chimney and furnace therein, the foundation of which is set in the ground.<sup>359</sup> (16) A wooden counting-room made of a framework of three sides fastened to the floor by nails and to the brick wall of the building in which it stands.<sup>360</sup> (17) A counter, a portable furnace with necessary connections and a fire-proof safe.<sup>361</sup> (18) A brick building used for an engine house connected with a leased building only by a tin flashing for a protection from the weather. Also an engine and boiler resting on solid foundations of masonry and connected with an iron smoke-stack running through the roof and connected by belting with machinery placed in the leased building; also such machinery and belting.<sup>362</sup> (19) An engine placed by a tenant on solid masonry to which it was affixed by iron bolts, and connected with a mill by pipes, belts, shafting and gearing, as well as a boiler connected with the engine and set upon solid masonry but not affixed thereto except by its weight, and which could not be removed without tearing down brick work surrounding it, and also part of the building, are not mere chattels for which trover will lie.<sup>363</sup> (20) A ventilator and piping fastened to the brick work of a building by many bolts.<sup>364</sup>

§ 216. What are not fixtures.<sup>365</sup>—(1) A bell hung in the cupola of a barn, on an axle resting upon a wooden frame

<sup>358</sup> Talbot v. Whipple, 14 Allen, 177.

<sup>359</sup> *Ibid.*

<sup>360</sup> Brown v. Wallis, 115 Mass. 156.

<sup>361</sup> Watriss v. Cambridge National Bank, 124 Mass. 571.

<sup>362</sup> Smith v. Whitney, 147 Mass. 479.

<sup>363</sup> Raddin v. Arnold, 116 Mass. 270.

<sup>364</sup> National Ventilator Co. v. Winslow, 215 Mass. 462.

<sup>365</sup> As to Manure, see *supra*, § 210.

placed on the platform of the cupola and secured to it by nailed cleats.<sup>366</sup> (2) A baker's brick oven with an iron lining and door "having no removable identity, and so united to the building that the two became inseparable without the destruction of the one and a substantial injury to the other."<sup>366</sup> (3) A platform used for flying horses and connected with a hotel by cleats.<sup>367</sup> (4) All articles which are furniture or personal chattels, as to which see *infra*, § 218.

§ 217. Buildings as fixtures.<sup>368</sup>—"Prima facie all buildings, and especially dwelling houses, belong to the owner of the land on which they stand, as part of the realty. It is only by virtue of some agreement with the owner of the land that buildings can be held by another party as personal property, with a right of removal. If erected wrongfully or voluntarily, without such agreement, they become the property of the owner of the soil.<sup>369</sup> . . . But when erected by a tenant for purposes of trade and business, the agreement for separate ownership and right to remove may be implied from the circumstances of the case, the relations of the parties and usage."<sup>370</sup>

The agreement for this purpose may be either express or implied,<sup>371</sup> and may be implied from the fact that the buildings were erected by permission from the owner of the land.<sup>372</sup>

<sup>366</sup> *Weston v. Weston*, 102 Mass. 514.

<sup>366</sup> *Collamore v. Gillis*, 149 Mass. 578.

<sup>367</sup> *Trask v. Little*, 182 Mass. 8.

<sup>368</sup> As to purchase of buildings by the lessor, see *supra*, § 94.

<sup>369</sup> *Morris v. French*, 106 Mass. 326; *Howard v. Fessenden*, 14 Allen, 124; *Gibbs v. Estey*, 15 Gray, 587; *Sudbury Parish v. Jones*, 8 Cush. 184, 189; *Washburn v. Sproat*, 16 Mass. 449; *Peirce v. Goddard*, 22 Pick. 559; *Madigan v. McCarthy*, 108 Mass. 376; *Poor v. Oakman*, 104 Mass. 309, 317. See *Ashmun v. Williams*, 8 Pick. 402; *Cooper v. Adams*, 6 Cush. 87; *Eastman v. Foster*, 8 Met. 19, 26; *Wall v. Hinds*, 4 Gray, 256, 271; 2 Ops. Atty.-Gen. 23; *Peters v. Stone*, 193 Mass. 179, 186; *Searle v. Bishop of Springfield*, 203 Mass. 493.

<sup>370</sup> *Wells, J.*, in *Howard v. Fessenden*, 14 Allen, 124, 128; *Taylor v. Townsend*, 8 Mass. 411; *Sudbury Parish v. Jones*, 8 Cush. 184, 190. See also as to evidence of usage, *Van Ness v. Packard*, 2 Pet. (U. S.) 137.

<sup>371</sup> *Sudbury Parish v. Jones*, 8 Cush. 184; *Murphy v. Marland*, 8 Cush. 575; *Howard v. Fessenden*, 14 Allen, 124, 128; *Ryder v. Faxon*, 171 Mass. 206.

<sup>372</sup> *Howard v. Fessenden*, 14 Allen, 124; *Wells v. Banister*, 4 Mass. 514; *Doty v. Gorham*, 5 Pick. 487; *Hinckley v. Baxter*, 13 Allen, 139; *Curtis v. Riddle*, 7 Allen, 185; *Belding v. Cushing*, 1 Gray, 576; *Van Ness v. Pack-*

So the facts that the owners of the land never claimed the building, and that rents and dealings with the land were always without reference to the building tend to show that it is personal property.<sup>373</sup> The court has said:<sup>374</sup> "Of course, this is not the necessary implication from such permission, and will not be drawn when a different intention of the parties is indicated by the terms of any express agreement between them in relation to the subject."<sup>375</sup> Nor will it be drawn when a different intention is to be inferred from the interest of the party making the erections, or from his relations to the title in the land; as in case of buildings erected by a mortgagor;<sup>376</sup> or by one in possession under a bond for a deed;<sup>377</sup> or by a reversioner of the entire estate."<sup>378</sup>

Where the agreement is express it need not be in writing, as it relates to personal property,<sup>379</sup> but in any case it must be made before the erection of the building. "Such separation of the personal from the real estate to which it is attached is to be established by evidence of assent to the erection of the same, before the structure is erected and has become attached

ard, 2 Pet. 137; *Korbe v. Barbour*, 130 Mass. 255; *Madigan v. McCarthy*, 108 Mass. 376; *Ashmun v. Williams*, 8 Pick. 402; *Searle v. Bishop of Springfield*, 203 Mass. 493; *Noyes v. Gagnon*, 225 Mass. 580, 585.

"In the present case the lease itself shows the lessor's assent that the lessee should erect the building and the evidence that the lessor directed that it should be so built that it could be moved when the lease expired, that he made no reply when told by the lessee that he would have to mortgage the building to pay for it, and that the lessor told the lessee that he did not want him to put in any wall or anything that would obstruct the place, justified a finding that there was an agreement that the building should be the personal property of the lessee." *Ryder v. Faxon*, 171 Mass. 206.

<sup>373</sup> *Noyes v. Gagnon*, 225 Mass. 580.

<sup>374</sup> *Wells, J.*, in *Howard v. Fessenden*, 14 Allen, 124, 128.

<sup>375</sup> *Milton v. Colby*, 5 Met. 78; *Hutchins v. Shaw*, 6 Cush. 58.

<sup>376</sup> *Winslow v. Merchants Insurance Co.*, 4 Met. 306.

<sup>377</sup> *Murphy v. Marland*, 8 Cush. 575.

<sup>378</sup> *Cooper v. Adams*, 6 Cush. 87.

<sup>379</sup> *Curtis v. Riddle*, 7 Allen, 185, 187.

Evidence outside of the lease, tending to show an agreement between the lessor and the lessee that a building erected on the land shall remain personal property of the lessee is rightly admitted; and is not inconsistent with a statement in the lease that the land is "to be occupied by a building thereon by said," lessee, or with the usual clause as to redelivery. *Ryder v. Faxon*, 171 Mass. 206.

to the realty, and thus had its character fixed. . . . After that period of time, the building, though it might be an unfurnished building, was a building attached to the real estate and would pass as such. The intention of the parties, if it existed to change this to personal property, was one which the law could not carry into effect."<sup>380</sup> Nor can declarations of a mesne owner of the premises that he did not own or claim the house affect the title of a subsequent grantee.<sup>381</sup> If the owner recognizes the right of the tenant to remove a building from the premises as personal property, it is held that a purchaser from the owner's assignees in bankruptcy, who knew of the agreement, was bound by it, although the assignees told him that the tenant's claim was unfounded.<sup>382</sup>

Although a building by virtue of a special agreement be personal property, yet if the owner of the house sell it to the owner of the land, it immediately becomes realty.<sup>383</sup>

If, under the lease, the landlord is to pay the tenant at the end of the term for buildings erected by the latter, such buildings to be appraised in a certain manner, the buildings pass to the lessor at the end of the term, and the appraisal is not an absolutely necessary condition precedent to the obligation of the lessor to pay, but the lessee must show that he has done all in his power to obtain such an appraisal.<sup>384</sup> Furthermore, it has been held that where the term is forfeited for non-payment of rent before its expiration, the tenant loses his rights under such a contract.<sup>385</sup>

Where the agreement is such as to make the building not merely a fixture, but personal property, as is often the case, the tenant can maintain trover for its conversion.<sup>386</sup> And where the owner of the land claims the building and interferes

<sup>380</sup> *Gibbs v. Esty*, 15 Gray, 587, per Dewey, J., citing *Richardson v. Copeland*, 6 Gray, 538.

<sup>381</sup> *Gibbs v. Estey*, 15 Gray, 587, 589.

<sup>382</sup> *Morris v. French*, 106 Mass. 326. *Cp. Searle v. Bishop of Springfield*, 203 Mass. 493.

<sup>383</sup> *Curtis v. Riddle*, 7 Allen, 185. As to sale of buildings, see *Moseley v. Allen*, 138 Mass. 81; *Carpenter v. Pocasset Manuf. Co.*, 180 Mass. 130; *Toupin v. Peabody*, 162 Mass. 473; *Hollywood v. First Parish in Brockton*, 192 Mass. 269, and *supra*, § 94.

<sup>384</sup> *Hood v. Hartshorn*, 100 Mass, 117.

<sup>385</sup> *Kutter v. Smith*, 2 Wall. (U. S.) 491.

<sup>386</sup> *Searle v. Bishop of Springfield*, 203 Mass. 493.

with the tenant's right of removal, the tenant may maintain a bill in equity to establish his ownership and to enjoin the owner from interfering with the removal.<sup>387</sup> In such a case the tenant has a reasonable time after the filing of the rescript, if the case has gone to the Supreme Judicial Court, in which to remove the building.<sup>388</sup>

On the other hand, if the building is a fixture, it is realty so long as annexed to the soil, and the tenant having only the right of removal, cannot bring any action of tort in the nature of trover for its removal or conversion by the landlord.<sup>389</sup>

Where there is an agreement that a building shall belong to a lessee, it makes the building personal property; and the lessee may remove it during the term, but not afterward.<sup>390</sup> And if the lessor enters for breach of condition the lessee loses his right to remove the building, even though there is an agreement that it shall belong to him.<sup>391</sup>

Covenants for redelivery in good order and against waste are not conclusive against buildings being personal property of a tenant;<sup>391a</sup> nor is a decree of the Land Court registering the land in the lessor.<sup>392</sup>

Evidence that the lessor and his predecessors never claimed to own buildings, that rents were adjusted without reference to them, that the owners of the buildings had transferred them by bills of sale, that the lessor had never insured them, and that the lessor had protested against being taxed for them is competent upon the question of ownership.<sup>393</sup>

§ 218. Furniture and personal chattels.—There are many articles used by tenants which "are in their nature articles of furniture, and the fact that they were fastened to the walls for safety or convenience does not deprive them of their character as personal chattels and make them a part of the realty."<sup>394</sup>

<sup>387</sup> *Noyes v. Gagnon*, 225 Mass. 580.

<sup>388</sup> *Ibid.*, p. 588.

<sup>389</sup> *Korbe v. Barbour*, 130 Mass. 255, 259.

<sup>390</sup> *Burk v. Hollis*, 98 Mass. 55; 2 Ops. Atty.-Gen., 23. See *Noyes v. Gagnon*, 225 Mass. 580.

<sup>391</sup> *Kutter v. Smith*, 2 Wall. 491; 2 Ops. Atty.-Gen., 23.

<sup>391a</sup> *Noyes v. Gagnon*, 225 Mass. 580.

<sup>392</sup> *Ibid.*

<sup>393</sup> *Noyes v. Gagnon*, 225 Mass. 580. Query as to evidence of assessors that at one time the buildings had been assessed to the tenants. *Ibid.*

<sup>394</sup> *Morton, J.*, in *Guthrie v. Jones*, 108 Mass. 191, 193.

Whether an article is a fixture or a personal chattel may to some extent depend on whether it can be used equally well elsewhere.<sup>395</sup> Thus, (1) a glass case, a case of drawers and a large mirror used by a tenant in his business as keeper of a restaurant, and screwed or nailed to the walls, and gas fixtures screwed upon pipes fastened to the ceiling, are personal chattels, and not fixtures.<sup>396</sup> (2) Show cases, consisting of drawers below, with shelves, doors and mirrors above, resting on the floor, but fastened to the wall with nails, one thirty feet and the other thirty-nine feet in length, although from their size it was not necessary to paint the wall behind them.<sup>397</sup> (3) A boiler and tank placed on a foundation of brickwork and cement, the edges of the brickwork being cemented before the boiler was placed thereon, these articles being easily removable, and such as could be used equally well elsewhere.<sup>398</sup> (4) A large wooden ice-chest lined with zinc, which was "in no way or manner connected with or affixed to the building, but was so large that it could not be removed through the door or from the room without taking it to pieces."<sup>399</sup> (5) A building sixteen feet wide by twenty-five feet long and eight feet high, built of very slight materials, containing a single room and without cellar, chimney or plastering, and built in sections so framed that they can be taken apart without cutting and resting upon unbroken ground.<sup>400</sup> (6) A china cabinet and a hotwater heater.<sup>401</sup>

"The nature or character of the article cannot be determined by its size or weight only. A bedstead, wardrobe, sideboard or bookcase is often large and heavy and incapable of being removed from a room or house without being taken apart; but no one would contend that for that reason such an article is to be regarded as a fixture, and that it would pass on a sale of realty to the purchaser."<sup>402</sup>

The distinction between personal chattels and fixtures is,

<sup>395</sup> *National Ventilator Co. v. Winslow*, 215 Mass. 462 (*semble*).

<sup>396</sup> *Guthrie v. Jones*, 108 Mass. 191, 193. For other articles which may be personal chattels, see *Holbrook v. Chamberlin*, 116 Mass. 155.

<sup>397</sup> *Kimball v. Grand Lodge of Masons*, 131 Mass. 59.

<sup>398</sup> *Cooper v. Johnson*, 143 Mass. 108.

<sup>399</sup> *Park v. Baker*, 7 Allen, 78.

<sup>400</sup> *O'Donnell v. Hitchcock*, 118 Mass. 401. *Cp.* *Swift v. Boyd*, 202 Mass. 26.

<sup>401</sup> *Houle v. Abramson*, 210 Mass. 83.

<sup>402</sup> *Bigelow, C. J.*, in *Park v. Baker*, 7 Allen, 78 (case of an ice-chest).

that the title to fixtures passes to the landlord, if at the end of the term the tenant does not remove them; the title to personal chattels, however, remains in the tenant, who has a reasonable time in which to remove them, although the landlord, after suitable notice to the tenant to remove them, may charge storage for them or remove them for storage elsewhere.<sup>403</sup>

If the landlord forcibly prevents the tenant during the tenancy from removing such chattels, and refuses a demand of the tenant for leave to remove them, and claims them as his, he is liable to an action of tort for the conversion.<sup>404</sup> Inasmuch as chattels, when left by the tenant, do not become the property of the landlord through being affixed to the soil, they may be attached by a creditor of the tenant after the latter has left the premises.<sup>405</sup>

§ 219. When fixtures may be removed.<sup>406</sup>—"The general rule is well settled that . . . fixtures become annexed to the real estate; but the tenant may remove them during his term, and, if he fails to do so, he cannot afterwards claim them against the owner of the land.<sup>407</sup> This rule always applies when the term is of *certain duration*, as under a lease for a term of years which contains no special provisions in regard to fixtures;"<sup>408</sup> and the fact that a subsequent lease of the

<sup>403</sup> Talbot v. Whipple, 14 Allen, 177, 181; Swift v. Boyd, 202 Mass. 26. As to the rights of vendors of chattels to the tenant by conditional sale, see Wentworth v. Woods Machine Co., 163 Mass. 28.

<sup>404</sup> Guthrie v. Jones, 108 Mass. 191; Korbe v. Barbour, 130 Mass. 255. In Berry v. Friedman, 192 Mass. 131, the landlord had allowed a tenant to take in a leased piano by temporarily enlarging a window. He later requested the owner to take the piano away, but refused to allow the window to be again enlarged. It was held that this was not a conversion, but that the owner on giving bond to cover damage might have permission in equity to enlarge the window and remove the piano.

<sup>405</sup> O'Donnell v. Hitchcock, 118 Mass. 401.

<sup>406</sup> Cp. the rules as to Crops and Emblements, *supra*, § 209.

<sup>407</sup> Noyes v. Gagnon, 225 Mass. 580, 585; Wall v. Hinds, 4 Gray, 256; Bliss v. Whitney, 9 Allen, 114; Watriss v. First National Bank, 124 Mass. 571. See Hood v. Hartshorn, 100 Mass. 117.

<sup>408</sup> Watriss v. Cambridge National Bank, 124 Mass. 571, 575, per Endicott, J.; Ewell on Fixtures, 2d ed., 199; Gaffield v. Hapgood, 17 Pick. 192; Whiting v. Barstow, 4 Pick. 310; Doty v. Gorham, 5 Pick. 487; Winslow v. Merchants Insurance Co., 4 Met. 306; First Sudbury Parish v. Jones, 8 Cush. 184; Talbot v. Whipple, 14 Allen, 177, 181; Bliss v. Whitney, 9



same premises is taken will not entitle the lessee to remove fixtures at any time during the second term.<sup>409</sup>

The above was formerly the general rule, and is supported by the weight of authority. In more recent cases, however, it is held that, although the term be certain and has expired, yet if one remain in possession after the term claiming to be a tenant, he is entitled to a further time in which to remove fixtures. Thus it is said in a leading English case: "The tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself a tenant."<sup>410</sup>

This would give the tenant the *whole period* of his tenancy at sufferance in which to remove the fixtures. And it would seem that, once a tenant at sufferance is allowed to remove fixtures, his case is one of uncertain duration of tenancy, falling under the first exception to the general rule noted below; and that he is entitled to a *reasonable time after a demand for possession* by the owner, as a part of the period mentioned in the foregoing opinion. This was apparently the rule adopted in *Antoni v. Belknap*.<sup>411</sup> In this case, a written lease was lawfully terminated by the lessor, thus making the lessees tenants at sufferance, "entitled to such reasonable time to remove themselves and their property from the premises as the nature of the case required."<sup>412</sup> It was accordingly held, that two months from the date of a demand for possession might be a reasonable time in which to remove certain ice and ice houses, which the tenants were entitled to remove. It has been said, however, that if a tenant at sufferance quits the prem-

Mass. 114; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Brown v. Wallis*, 115 Mass. 156; *Shepard v. Spaulding*, 4 Met. 416; *Trask v. Little*, 182 Mass. 8; *National Ventilator Co. v. Winslow*, 215 Mass. 462; *Noyes v. Gagnon*, 225 Mass. 580, 585. *Cp.* *Sullivan v. Carberry*, 67 Me. 531, where the tenant was held entitled to a reasonable time *after* the end of the term.

<sup>409</sup> *Watriss v. Cambridge National Bank*, 124 Mass. 571; *Re Stevens*, 2 Lowell, 496, 500.

<sup>410</sup> *Weeton v. Woodcock*, 7 M. & W. 4, per Anderson, B.; *Re Stevens*, 2 Lowell, 496, 500, per Lowell, J., citing also *Penton v. Robart*, 2 East, 88; *Roffey v. Henderson*, 17 Q. B. 574; *Heap v. Barton*, 12 C. B. 274; *Mimball v. Lloyd*, 2 M. & W. 450. This rule is also stated as given above in *Ewell on Fixtures*, 2d ed., 205; 2 *Taylor, Landl. & Ten.*, 9th ed., § 551, p. 161; 2 *Wood, Landl. & Ten.*, 2d ed., 1261.

<sup>411</sup> 102 Mass. 193, 200. *Cp.* *Noyes v. Gagnon*, 580, 588.

<sup>412</sup> *Ibid.*, per Wells, J.



ises and leaves fixtures thereon he cannot afterwards claim them, even though within a reasonable time; in other words, the possession must be continuous to give the right.<sup>413</sup>

It is true that, after reviewing a number of English cases, the following language was used by Endicott, J., in another case:<sup>414</sup> "It is clear from these cases that the right of a tenant, in possession after the end of his term to remove fixtures *within a reasonable time*, does not rest merely on the fact that he is in occupation, or has not evinced an intention to abandon, but because he is still, in contemplation of law, in occupation as tenant under the original lease, and, as Baron Parke says,<sup>415</sup> under what may be considered an excrescence on the term, that is, as tenant at sufferance." This language might seem to imply that a tenant at sufferance has only a reasonable time after becoming such in which to remove fixtures, and not the whole time in which he holds possession as such tenant. But this part of the opinion was only a *dictum*, and perhaps was not intended to conflict with the other authorities given.

A surrender of the term by the tenant is equivalent to the expiration of the term within the above rule;<sup>416</sup> and the right to remove fixtures is not revived by a subsequent lease between the same parties. It has also been held that the taking of a new lease of the premises, reserving no rights to the lessee of removing fixtures annexed during the previous term, constitutes in effect a similar surrender, though the occupation is continuous.<sup>417</sup> Therefore, in the case of a renewal or a surrender made to take a new lease, the right to remove fixtures should be expressly reserved.

A vendee,<sup>418</sup> or a mortgagee,<sup>419</sup> of fixtures of course stands in no better position than the lessee.

<sup>413</sup> *Leader v. Homewood*, 5 C. B. N. s., 546.

<sup>414</sup> *Watriss v. Cambridge Nat. Bank*, 124 Mass. 571, 577.

<sup>415</sup> *Mackintosh v. Trotter*, 3 M. & W. 184.

<sup>416</sup> *Talbot v. Whipple*, 14 Allen, 179, 181; *Shepard v. Spaulding*, 4 Met. 416; *McIver v. Estabrook*, 134 Mass. 550.

<sup>417</sup> *Watriss v. Cambridge National Bank*, 124 Mass. 571; 2 Taylor, Landl. & Ten., 9th ed., § 552. But see, *contra*, *Re Stevens*, 2 Lowell, 496, 500, holding that even a parol renewal of a lease renews whatever rights the tenant had to remove fixtures. So also *Cooley, J.*, in *Kerr v. Kingsbury*, 31 Mich. 150.

<sup>418</sup> *Gaffield v. Hapgood*, 17 Pick. 192. See *Smith v. Bay State Savings Bank*, 202 Mass. 482.

<sup>419</sup> *Talbot v. Whipple*, 14 Allen, 177, 182. *Cp.* *Stone v. Livingston*, 222 Mass. 192.

In one case, a tenant under the terms of his lease had the right to remove a house he had erected upon the premises. The Court said: "This gave only the right to remove the house at the end of the lease, as a tenant's fixture; and he did not avail himself of this right, or even make a demand for the house for six weeks after the lease expired which is much more than a reasonable time. If the difficulty of removing so large and ponderous a fixture would require, as has been argued for the plaintiff, so long a period of time to accomplish it, we can have no doubt that it was wholly unreasonable to wait so long before beginning to remove it, or making any attempt for that purpose. The house, therefore, became annexed to the realty."<sup>420</sup>

The right to remove fixtures seasonably is not defeated by the fact that such removal can be made only with some injury to the building or to the fixtures, providing the injury to the building is not substantial, and the things removed do not lose their essential character or value as a personal chattel.<sup>421</sup> "It is true that machines or structures which cannot be severed without taking them in pieces may nevertheless often be removed."<sup>422</sup> . . . We are not inclined to extend the right of removal so far as to include a thing which cannot be severed from the realty without being destroyed, or reduced to a mere mass of crude materials.<sup>423</sup> The tenant must repair any injury due to removal of fixtures.<sup>424</sup> So, where the tenant has substituted during his term a fixture of his own for one which he found on the premises, on taking down his own fixture he must replace the one which was originally there, or one similar.<sup>425</sup>

So, the right of removal is not lost where the tenant moves out of the building preparatory to its sale and removal, unless there is something further to show an intention to abandon his rights.<sup>426</sup>

<sup>420</sup> *Burk v. Hollis*, 98 Mass. 55, per Hoar, J., 2 Ops. Atty.-Gen., 23.

<sup>421</sup> *Wall v. Hinds*, 4 Gray, 256; *Hanrahan v. O'Reilly*, 102 Mass. 201. See *infra*, § 221.

<sup>422</sup> *Antoni v. Belknap*, 102 Mass. 193.

<sup>423</sup> C. Allen, J., in *Collamore v. Gillis*, 149 Mass. 578 (case of a brick oven).

<sup>424</sup> 2 Taylor, Landl. & Ten., 9th ed., § 550; *Re Stevens*, 2 Lowell, 496.

<sup>425</sup> *Re Stevens*, 2 Lowell (U. S.) 496; *Ewell on Fixtures*,\* 99; *Re Breck*, 8 Ben. (U. S.) 93, 97.

<sup>426</sup> *Howard v. Fessenden*, 14 Allen, 124.

Nor is the right lost by the fact that the tenant is in arrear in his rent, or has received a notice to quit for that cause. His right is lost only by actual quitting possession of the premises, and even then if the landlord prevents his taking them away the right is not lost.<sup>427</sup>

On the other hand, the better opinion seems to be that the right to remove fixtures is lost by a forfeiture and reëntry.<sup>428</sup> Mere breach of condition is not enough; for, as we have seen,<sup>429</sup> it renders the lease voidable only.

§ 220. Exceptions to general rule.—(1) “But where the term in *uncertain* or depends on a contingency, as where a party is in as tenant for life, or at will, or where the estate is terminated without the tenant’s act or default, fixtures may be removed within a reasonable time after the tenancy is determined,”<sup>430</sup> and the same is true of a tenant at sufferance.<sup>431</sup> But it has been said that this holds good only if the tenant remains in possession, and that if he quits the premises he cannot remove fixtures even within a reasonable time.<sup>432</sup>

The language of some of the cases would seem to imply that a tenant at will has the same length of time in which to remove fixtures as he has in which to remove himself, his family, and personal chattels. *Quære*, whether, under the present statute, fixtures not removed at the end of fourteen days after service of a notice to quit become the property of the landlord.

In one case, it appeared that the fixture was an ice house

<sup>427</sup> *Re Stevens*, 2 Lowell, 496.

<sup>428</sup> 2 Taylor, Landl. & Ten., 9th ed., § 551; Ewell on Fixtures, 2d ed., 210; Ferard on Fixtures, 103, 104; Pugh v. Arton, L. R., 8 Eq. 626, per Malins, V. C.; Kutter v. Smith, 2 Wall. 491; 2 Ops. Atty.-Gen., 23. *Contra Re Stevens*, 2 Lowell, 496; 2 Wood, Landl. & Ten., 2d ed., 1265, but see p. 1266.

<sup>429</sup> *Supra*, § 112.

<sup>430</sup> *Watriss v. Cambridge National Bank*, 124 Mass. 571, 575, Endicott, J.; *Ellis v. Paige*, 1 Pick. 43, 49; *Doty v. Gorham*, 5 Pick. 487, 490; *Whiting v. Brastow*, 4 Pick. 310, 311; *Rising v. Stannard*, 17 Mass. 282; *Antoni v. Belknap*, 102 Mass. 193, 200. *Cp.* as to Tenancy at Will, *supra*, §§ 159–178.

<sup>431</sup> *Antoni v. Belknap*, 102 Mass. 193; *Watriss v. Cambridge National Bank*, 124 Mass. 571. *Cp.* as to Tenancy at Sufferance, *supra*, § 180.

<sup>432</sup> 2 Wood, Landl. & Ten., 2d ed., 1265, citing *Leader v. Homewood*, 5 C. B. N. S. 546.

containing upwards of two thousand tons of ice; that, except for one sale of one hundred tons, the ice was not carried away, after a demand for the removal of the fixture, faster than the daily consumption of customers required; that about two months were consumed in thus removing it, but that the ice could not have been transferred to another building without destroying its value; and that the building was promptly removed after the last ice was out of it. The landlord offered no evidence that the tenant could have removed the ice any quicker, and himself testified that it had been removed as speedily as possible. It was held that the building had been removed within a reasonable time.<sup>433</sup>

(2) A second exception to the general rule occurs where the landlord forcibly prevents the tenant from removing fixtures during or at the end of the term, as by attachment or injunction.<sup>434</sup>

§ 221. Remedies.—If a tenant has the right to remove certain fixtures, he is not estopped from doing so, as against a grantee of the landlord, by the fact that he was present as a bidder at an auction sale of the premises without disclosing his claim in regard to the fixtures.<sup>435</sup>

While fixtures are annexed to the realty, a landlord who merely forbids and prevents the tenant from removing them is not liable to an action of tort for converting them, as they are not personal property until severed;<sup>436</sup> and, for the same reason, he is not liable to an action of replevin.<sup>437</sup>

In a suitable case, a tenant can maintain a bill in equity to establish his rights to remove buildings and to enjoin the landlord from interfering with such removal.<sup>438</sup>

The wrongful removal of fixtures by a tenant amounts to

<sup>433</sup> *Antoni v. Belknap*, 102 Mass. 183.

<sup>434</sup> *Re Stevens*, 2 Lowell, 496; *Ewell on Fixtures*,\* 141.

<sup>435</sup> *Hanrahan v. O'Reilly*, 102 Mass. 201. But see *Trask v. Little*, 182 Mass. 8, *supra*, § 214.

<sup>436</sup> *Guthrie v. Jones*, 108 Mass. 191; *Gaffield v. Hapgood*, 17 Pick. 192; *Raddin v. Arnold*, 116 Mass. 270; *Brown v. Wallis*, 115 Mass. 156; *Ryder v. Faxon*, 171 Mass. 206; *Trask v. Little*, 182 Mass. 8; *Natural Ventilator Co. v. Winslow*, 215 Mass. 462. See also *Smith v. Bay State Savings Bank*, 202 Mass. 482, 485. But in the case of furniture and personal chattels the rule is otherwise. *Guthrie v. Jones*, 108 Mass. 191; *Korbe v. Barbour*, 130 Mass. 255. See *supra*, § 218.

<sup>437</sup> *Brown v. Wallis*, 115 Mass. 156.

<sup>438</sup> *Noyes v. Gagnon*, 225 Mass. 580.

waste, and the tenant is liable accordingly.<sup>439</sup> A tenant may maintain an action of tort in the nature of trespass *de bonis asportatis* against a stranger who removes fixtures.<sup>440</sup>

We have seen that, where there is a special agreement as to fixtures, it overrides the general rules of law regarding them; therefore, if a tenant removes fixtures in violation of such an agreement, the remedy of the landlord is on the agreement, and not on a covenant against waste.<sup>441</sup>

"For the unavoidable injury resulting to the premises from the removal of the fixtures the [landlord] may perhaps have a remedy against the [tenant], or those who severed the fixtures from the building."<sup>442</sup> But whether, apart from express agreement, a tenant is liable for every injury from the removal of fixtures, *quære*.<sup>443</sup> It is clear that he is liable for any wanton and unnecessary injury.<sup>444</sup>

The landlord may also have a remedy in equity to restrain the unlawful removal of fixtures.<sup>445</sup>

§ 222. **Apportionment of rent.**—Apportionment of rent occurs, as to persons, where the right to receive the rent becomes vested in several persons; as to extent of estate, where by operation of law or act of the parties only a portion of the estate demised remains in possession of the tenant; or, as to time, when the tenancy is ended at some period other than one of the regular intervals for the payment of rent.<sup>446</sup> There may be an apportionment by express agreement of the parties.<sup>447</sup>

§ 223. **As to persons.**—"It seems to be well settled, that when the estate out of which the rent issues is assigned to two or more, the rent shall be apportioned to each part according to its annual value. Indeed this necessarily follows from the

<sup>439</sup> See *supra*, §§ 202-204 and *infra*, §§ 274-276.

<sup>440</sup> *Miller v. Baker*, 1 Met. 27. He has an interest distinct from that in the freehold.

<sup>441</sup> *Wall v. Hinds*, 4 Gray, 256.

<sup>442</sup> Bigelow, J., in *Wall v. Hinds*, 4 Gray, 256, 273; Ferard on Fixtures, 2d Am. Ed., \*89; Amos & Ferard on Fixtures, 4th ed., 124; *Foley v. Addenbroke*, 13 M. & W. 174; *Re Breck*, 8 Ben. (U. S.) 93, 97.

<sup>443</sup> *Martin v. Roe*, 7 Ell. & Bl. 237, 244.

<sup>444</sup> Ewell on Fixtures, 2d ed., 202; *Hare v. Horton*, 5 B. & Ad. 715; *Foley v. Addenbroke*, 13 M. & W. 174.

<sup>445</sup> *Peters v. Stone*, 193 Mass. 179. *Cp. Houle v. Abramson*, 210 Mass. 83.

<sup>446</sup> Bouv. Law Dict.

<sup>447</sup> *Blake v. Sanderson*, 1 Gray, 332.

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general provision, that the assignee shall be liable in debt for the rent; otherwise, and if the rent could not be apportioned, the right of the lessor to the rent could be defeated, by conveying the estate to two or more persons.”<sup>448</sup> “There is no doubt, therefore, that a rent charge may be apportioned, whenever the reversioner or owner of the rent either releases part of the rent to the tenant, or conveys part of the land to a stranger.”<sup>449</sup> The rent is also liable to apportionment by act of law, as in cases of descent and judicial sales.”<sup>450</sup> It is for the jury to apportion the rent to the value of the respective shares.

Rent can be apportioned only by act of the lessor. The lessee may assign his estate but remains liable for the rent by privity of contract, and the rule is the same in case there be several joint lessees.<sup>451</sup>

§ 224. As to extent of estate.—It is provided by statute that “A person in possession of land out of which rent is due shall be liable for the amount or proportion of rent due from the land in his possession although it is only a part of that originally demised.”<sup>452</sup>

In speaking of this section of the statute and the following one, the Court has said: “It has been argued, that by these provisions, the rent may be apportioned whenever the lease terminates, before the rent becomes due by the terms of the contract. But such a construction would be opposed to the words and the obvious meaning of these sections. The twenty-second section does not provide for the recovery of rent before it becomes due, and the contract must determine as to the time when it becomes due. That section authorizes the recovery and apportionment of rent when a person is in the possession of a part only of the land originally demised. And that apportionment was authorized by the common law,

<sup>448</sup> *Daniels v. Richardson*, 22 Pick. 565, 569, per Shaw, C. J., citing *Montague v. Gay*, 17 Mass. 439. *Cp.* *Newall v. Wright*, 3 Mass. 138, 153.

<sup>449</sup> Co. Lit. 148 a; Gilbert on Rents, 163.

<sup>450</sup> 3 Kent Com. 470; *Buffum v. Deane*, 4 Gray, 385.

<sup>451</sup> 1 Taylor, Landl. & Ten., 9th ed., § 385.

<sup>452</sup> G. L., c. 186, § 4; R. L., c. 129, § 4; Pub. St., c. 121, § 4; Gen. St., c. 90, § 24; Rev. St., c. 60, § 22. Cited in *Daniels v. Richardson*, 22 Pick. 569; *Campbell v. Stetson*, 2 Met. 504; *Earle v. Kingsbury*, 3 Cush. 208; *Rice v. Loomis*, 139 Mass. 303; *Warren v. Lyons*, 152 Mass. 311. *Cp.* *Emmes v. Feeley*, 132 Mass. 346.

and so debt could always be brought for rent due, and either party might give the lease in evidence. These sections, therefore, were merely declaratory of the law.”<sup>453</sup> They “do not declare when and by what acts a right to rent shall be created, vested, and transferred, but only declare how it may be recovered when it is due; that is apportioned and recovered in an action of debt. They are intended to prescribe remedies not to establish rights.”<sup>454</sup> They do not authorize any apportionment of rent in respect to time, where a tenancy is terminated between two rent days.<sup>455</sup>

“Such rent may be recovered in contract, and the deed of demise or other written instrument, if any, showing the provisions of the lease, may be used in evidence by either party to prove the amount of rent due from the defendant.”<sup>456</sup>

“Such action may be brought by or against executors and administrators for any arrears of rent accrued in the lifetime of the deceased parties, respectively, in the same manner as for debts due from or to the same parties in their lifetime on a personal contract.”<sup>457</sup>

“The six preceding sections shall not deprive landlords of any other legal remedy for the recovery of rents, whether secured by lease or by law.”<sup>458</sup>

The following statutory provision applies to cases of levy upon execution: “If the land is under lease as aforesaid and the reversion of a part only is taken, the appraisers shall determine the portion of the whole annual rent to be paid to the creditor, and the lessee shall pay it to him.”<sup>459</sup>

<sup>453</sup> *Earle v. Kingsbury*, 3 Cush. 206, per Wilde, J.

<sup>454</sup> *Shaw, C. J.*, in *Campbell v. Stetson*, 2 Met. 504.

<sup>455</sup> *Earle v. Kingsbury*, 3 Cush. 208.

<sup>456</sup> G. L., c. 186, § 5; R. L., c. 129, § 5; Pub. St., c. 121, § 5; Gen. St., c. 90, § 26; Rev. St., c. 60, § 23; *Daniels v. Richardson*, 22 Pick. 569; *Campbell v. Stetson*, 2 Met. 504; *Earle v. Kingsbury*, 3 Cush. 208; *Merrill v. Bullock*, 105 Mass. 491; *Bunton v. Richardson*, 10 Allen, 260; *Emmons v. Scudder*, 115 Mass. 371; *Rice v. Loomis*, 139 Mass. 303; *Warren v. Lyons*, 152 Mass. 311.

<sup>457</sup> G. L., c. 186, § 6; R. L., c. 129, § 6; Pub. St., c. 121, § 6; Gen. St., c. 90, § 27; Rev. St., c. 60, § 24. In *Daniels v. Richardson*, 22 Pick. 565, 569, *Shaw, C. J.*, says these provisions of the statute were simply declaratory of the common law.

<sup>458</sup> G. L., c. 186, § 7; R. L., c. 129, § 7; Pub. St., c. 121, § 7; Gen. St., c. 90, § 28; Rev. St., c. 60, § 25.

<sup>459</sup> G. L., c. 236, § 17; R. L., c. 178, § 18; Pub. St., c. 172, § 19; Gen.



A taking of a part of the premises by eminent domain does not exempt a lessee from his obligation to pay the reserved rent,<sup>460</sup> for the tenant is entitled to a share of the damages occasioned by the taking.<sup>461</sup> On the other hand, where there is an eviction from a part of the premises by a title paramount (not by the lessor), rent is apportionable, and the eviction is a bar *pro tanto* only.<sup>462</sup>

§ 225. *As to time.*—At common law there could be no apportionment of rent in respect to time; and a tenant was not obliged to pay for a fraction of the rental period, where his estate was determined between two rent days.<sup>463</sup> No recovery was allowed, either in an action for the rent or in an action for use and occupation.<sup>464</sup>

This rule is still the law, except in so far as it has been changed by statute. "It is well settled both at law and in equity except when otherwise provided by statute, that a contract for the payment of rent at the end of each quarter or month is not apportionable in respect of time."<sup>465</sup> And the rule is the same where the rent is payable in advance, and the tenancy is terminated by the landlord during the period for which the rent is payable.<sup>466</sup> The rule is important as between life-tenant and remainder-man, and capital and income.<sup>467</sup>

Thus, rent was formerly not apportionable where a tenancy

St., c. 103, § 14; Rev. St., c. 73, § 14. Even at common law, the method of proceeding was the same, and rent could not be taken on execution and set off by *elegit* as distinct from the reversion. *Montague v. Gay*, 17 Mass. 439.

<sup>460</sup> *Parks v. Boston*, 15 Pick. 198; *Patterson v. Boston*, 20 Pick. 159; *supra*, § 138.

<sup>461</sup> *Supra*, § 139.

<sup>462</sup> *Fillebrown v. Hoar*, 124 Mass. 580. See *supra*, § 143.

<sup>463</sup> 3 Kent Com. 471; *Earle v. Kingsbury*, 3 Cush. 206. The common law rule was changed in England, as to leases made by a life tenant, by St. 11 Geo. II, c. 19, § 15.

<sup>464</sup> *Leishman v. White*, 1 Allen, 489; *Nicholson v. Munigle*, 6 Allen, 215; *Fuller v. Swett*, 6 Allen, 219 n. The contrary *dictum* in *Fitchburg Cotton Mfg. Co. v. Melven*, 15 Mass. 268, was not followed.

<sup>465</sup> *Dexter v. Phillips*, 121 Mass. 178, per Gray, C. J.; *Sohier v. Eldredge*, 103 Mass. 345, overruling *Ex parte Foote*, 22 Pick. 269; *Hammond v. Thompson*, 168 Mass. 531; *Sutton v. Goodman*, 194 Mass. 389.

<sup>466</sup> *Sutton v. Goodman*, 194 Mass. 389, 395; *Hall v. Middleby*, 193 Mass. 485. It would seem that in this case, the tenant being in default, the rule might well be the other way. *Cp. supra*, § 166.

<sup>467</sup> *Dexter v. Phillips*, 121 Mass. 178.



at will was terminated between two rent days,<sup>468</sup> and this is still the rule where it is determined by the act of the landlord.<sup>469</sup> So, if the tenant be evicted before a given instalment of rent is due, the rent is not payable, nor can the tenant be held liable for use and occupation.<sup>470</sup> So, if the reversion be granted to another, the grantee is entitled to all rents becoming due after the grant, although for a period partly or chiefly before the grant, and there is no apportionment.<sup>471</sup>

It is provided by statute that "If land is held by lease of a person who has an estate therein determinable on a life or on a contingency, and such estate determines before the end of a period for which rent is payable, or if an estate created by a written lease or an estate at will is determined before the end of such period by surrender, either express or by operation of law, by notice to quit for non-payment of rent, or by the death of any party, the landlord or his executor or administrator may recover in contract, a proportional part of such rent according to the portion of the last period for which such rent was accruing which had expired at such determination." <sup>472</sup>

"If, upon the determination of a tenancy, in any manner mentioned in the preceding section, before the end of a period for which rent is payable, the rent therefor has been paid before such determination, a proportionate part thereof, according to the portion of such period then unexpired, may be recovered back in contract." <sup>473</sup>

The statute covers the case where the lessee exercises an option to purchase, and the lessor may recover rent up to the date of the tender.<sup>474</sup>

But the statute does not cover the case where the tenancy

<sup>468</sup> Fuller v. Swett, 6 Allen, 219 n.; Dexter v. Phillips, 121 Mass. 178, *supra*, § 176.

<sup>469</sup> See *infra* in this section.

<sup>470</sup> *Supra*, § 142.

<sup>471</sup> Burden v. Thayer, 3 Met. 76.

<sup>472</sup> G. L., c. 186, § 8; R. L., c. 129, § 8; Pub. St., c. 121, § 8; St., 1869, c. 368, §§ 1, 2, 3. Cited in Emmes v. Feeley, 132 Mass. 346; Adams v. Bigelow, 128 Mass. 365; Dixon v. Smith, 181 Mass. 218; Withington v. Nichols, 187 Mass. 575; Sutton v. Goodman, 194 Mass. 389; Ware v. Hobbs, 222 Mass. 327, 330.

<sup>473</sup> G. L., c. 186, § 9; R. L., c. 129, § 9; Pub. St., c. 121, § 9; St. 1869, c. 368, § 4. Cited in Withington v. Nichols, 187 Mass. 575; Ware v. Hobbs, 222 Mass. 327.

<sup>474</sup> Withington v. Nichols, 187 Mass. 575.

is determined by the voluntary act of the landlord;<sup>475</sup> and this is so even though the rent be payable in advance, if the tenancy is terminated by the landlord during the period for which the rent is payable.<sup>476</sup> So, the words "on a contingency" in the statute do not cover the case of an entry to foreclose by the holder of a mortgage made prior to the tenancy.<sup>477</sup> This has been expressed by the court as follows: "These words taken in the connection in which they are used, clearly refer to the happening of some event affecting the nature and character of the estate itself, and an essential and necessary part of it, upon which the continuance of the estate depends. But the estate of a mortgagor, or of an owner of the equity of redemption is not determined by the happening of any such event or contingency; it can only be determined through his own neglect to perform his contract, or to pay the debt which the mortgage is given to secure. Nor is the [landlord's] estate determined by the entry of the mortgagee; he has the right to redeem, and, if the plaintiff had redeemed in season, he would have been entitled to receive the rent he now seeks to recover."<sup>478</sup> It is therefore desirable, in spite of the statute, to insert in the lease a clause requiring the lessee to pay in like proportion for a fraction of the rental period in order to cover the case.

The following provision applies to cases of levy upon execution: "If the land levied upon is under lease to a third person, and the reversion of the whole is taken on the execution, the lessee shall pay to the creditor the rent accruing after the levy, except, such part as he has paid before notice of the levy."<sup>479</sup> "Such levy upon the land would include the rent accruing after it was made, and the attachment, if duly recorded, would constitute a lien on the real estate, and would prevent any intermediate assignment from affecting such rent."<sup>480</sup>

<sup>475</sup> *Emmes v. Feeley*, 132 Mass. 346 (where a tenancy at will was determined between rent days by a conveyance of the landlord); *Hammond v. Thompson*, 168 Mass. 531.

<sup>476</sup> *Sutton v. Goodman*, 194 Mass. 389, 394, 395; *Hall v. Middleby*, 197 Mass. 485, 489.

<sup>477</sup> *Adams v. Bigelow*, 128 Mass. 365.

<sup>478</sup> *Ibid.*, per Endicott, J.

<sup>479</sup> G. L., c. 236, § 16; R. L., c. 178, § 17; Pub. St., c. 172, § 18; Gen. St., c. 103, § 13; Rev. St., c. 73, § 13. Cited in *Schlesinger v. Sherman*, 127 Mass. 206.

<sup>480</sup> *Schlesinger v. Sherman*, 127 Mass. 206, 209, Gray, C. J.

## CHAPTER VI

### REMEDIES INTER SE

#### SECTION I

##### INTRODUCTORY

§ 226. **Actions for rent and for use and occupation.—****Historical.—Distress.**—The right of a landlord to distrain for rent due, *i. e.*, to seize his tenant's goods to satisfy his claim, does not exist in this Commonwealth, although its place is taken to some extent by the more general remedy of attachment upon mesne process.<sup>1</sup>

**Debt, covenant, assumpsit.**<sup>2</sup>—In this book, for convenience, the remedies of the landlord, in respect to recovery of rent due and in respect to recovery for use and occupation, are treated separately. Under the practice act, all actions of this sort are actions of contract, although rent may sometimes be recovered by a proceeding in equity.

At common law, however, the various forms of action, *viz.*, debt, covenant, special *assumpsit*, and *indebitatus assumpsit*, had special uses and were by no means concurrent remedies. A detailed discussion of these special uses would be beyond the scope of this work, but as throwing light upon the older cases and upon the present action of contract, a few words may be said in regard to the common law remedies.

(1) Debt lay for a certain definite sum which was owing by the tenant or could be made certain by computation. The recovery of this sum was the essence of the action of debt,<sup>3</sup>

<sup>1</sup> *Ex parte Waite*, 7 Pick. 105, per Parker, C. J.; *Potter v. Hall*, 3 Pick. 368, 373. St. 1825, c. 89, § 5, gave an action of *indebitatus assumpsit* in certain cases where rent was due "whether such deed, or lease, or contract contain a clause of distress or re-entry for non-payment of rent or not."

<sup>2</sup> For a more extended discussion of these common law remedies, see 2 Taylor, *Landl. & Ten.*, 9th ed., Chap. XIII, Sects. II, III and V; 2 Wood, *Landl. & Ten.*, 2d ed., Chaps. L, LI; Chit. Pl., Chap. II.

<sup>3</sup> If a plaintiff were successful, he could also recover damages for the detention of the rent, *i. e.*, the debt, but this was an incidental matter merely.

while in covenant and assumpsit the principal thing sought was the recovery of damages. Debt would always lie where the sum to be paid was definitely fixed, whether by a written lease under seal or by an express parol demise;<sup>4</sup> the foundation of the action being privity either of contract or estate.<sup>5</sup> Thus, debt lay by an assignee of the lessor, against an assignee of the lessee, for the rent reserved.<sup>6</sup> It could, therefore, have been used both for the "action for rent" and the "action for use and occupation" as the terms are used in this book, provided there was an express agreement fixing the rate of payment.<sup>7</sup> Under a plea of *non demisit* the defendant could give in evidence the counterpart of a lease reserving a different rent.<sup>8</sup>

(2) Special *assumpsit* was a concurrent remedy with debt, where there was an express demise as in the case of debt, and an express contract on the part of the tenant, to pay the agreed rent. But the action did not extend to leases under seal.<sup>9</sup>

(3) *Indebtitatus assumpsit*, unlike the two preceding remedies, was the regular remedy for the recovery of compensation for the use and occupation of premises where there was a tenancy by permission of the landlord but no express demise and no rate of payment fixed.<sup>10</sup> The remedy was afterwards extended by statute in England,<sup>11</sup> to the case of an express demise not under seal,<sup>12</sup> but could never be used where there

<sup>4</sup> Where rent is reserved by deed, debt or covenant is the proper remedy. *Codman v. Jenkins*, 14 Mass. 93, 95, 97; 1 Chit. Pl. 117, 377; *Warren v. Ferdinand*, 9 Allen, 357.

<sup>5</sup> *Walker's Case*, 3 Co. 22.

<sup>6</sup> *Howland v. Coffin*, 9 Pick. 51; s. c., 12 Pick. 125; *Patten v. Deshon*, 1 Gray, 325.

<sup>7</sup> Debt was the appropriate remedy in cases of apportionment, where the tenant kept only part of the estate originally demised. *Earle v. Kingsbury*, 3 Cush. 206.

<sup>8</sup> *Norwood v. Fairservice*, Quincy, 189 (1765).

<sup>9</sup> *Richards v. Killam*, 10 Mass. 239, 247. See *Brewer v. Dyer*, 7 Cush. 339.

<sup>10</sup> *Foa, Landl. & Ten.*, 2d ed. (1895) 303.

<sup>11</sup> St. 11 Geo. II, c. 19.

<sup>12</sup> In *Codman v. Jenkins*, 14 Mass. 93, 95, Wilde, J., speaks of this statute as if it were in force in this state; so also Jackson, J., p. 97. But the contrary view has been held in *Potter v. Hall*, 3 Pick. 373, per Parker, C. J.; *Walker v. Furbush*, 11 Cush. 366, per Metcalf, J.; 2 Dane Abr. 442. The point was not decided in *Gould v. Thompson*, 4 Met. 224, 227. The statute has been adopted in most of the other states.

was a sealed instrument of demise.<sup>13</sup> Nor could it be used where the title to real estate was in issue.<sup>14</sup>

(4) Covenant differed from the preceding remedies in lying, as its name implies, only upon the covenant of a lease under seal, and for a breach thereof.<sup>15</sup> It was therefore an "action for rent" strictly. Although not covering all the scope of the "action for rent," it was generally concurrent with debt as far as it went; but it was in its essence an action for damages, while debt, as has been said, was an action to recover a definite sum due.

§ 227. At the present day.—All actions at law for rent and for use and occupation, whether due under a sealed lease, a written lease not under seal, a verbal lease, a tenancy at will arising by implication, or a tenancy at sufferance, are now actions of "contract." But it is still convenient to divide these actions into "actions for rent" and "actions for use and occupation."

An "action for rent" lies only where there is a written lease under seal; that is to say, the declaration is a special one upon the lease, setting forth a copy thereof or the legal effect thereof; or now, by statute,<sup>16</sup> it may be upon a common count for rent, with a bill of particulars referring to the lease.<sup>17</sup> It also lies where a tenant holds over after the expiration of his sealed lease which contains a covenant to pay during such further holding, provided there has been no new contract of letting either written or oral, express or implied.<sup>18</sup>

An "action for use and occupation" lies in every case, except where there is a written lease under seal; and the declaration usually contains either a general count for use and occupation, or a count on an account annexed.<sup>19</sup> It lies where there has been a parol modification of a written lease under

<sup>13</sup> *Codman v. Jenkins*, 14 Mass. 93; *Richards v. Killam*, 10 Mass. 239, 247; *Warren v. Ferdinand*, 9 Allen, 357; *Smiley v. McLauthlin*, 138 Mass. 363; *Hunt v. Thompson*, 2 Allen, 341, 343.

<sup>14</sup> See *supra*, § 120.

<sup>15</sup> *Codman v. Jenkins*, 14 Mass. 93, 95, 97; 1 Chit. Pl. 117, 377; *Warren v. Ferdinand*, 9 Allen, 357; *Smiley v. McLauthlin*, 138 Mass. 363; *Leavitt v. Maykell*, 203 Mass. 506, 510.

<sup>16</sup> G. L., c. 231, § 7.

<sup>17</sup> See *infra*, Form.

<sup>18</sup> *Leavitt v. Maykell*, 203 Mass. 506, 510.

<sup>19</sup> *Infra*, § 255; 2 Chitty Pl., 16th Amer. Ed., 181.

seal,<sup>20</sup> and is therefore the proper action against a tenant at will, or at sufferance under the statute.<sup>21</sup>

This distinction between "rent" and "use and occupation" is made simply for clearness and convenience; for, "according to the usage in this Commonwealth, the word 'rent' applies as well to payments made by a tenant at will or at sufferance as to those made by a tenant for years."<sup>22</sup> This indiscriminate use of the word "rent," however, is apt to make confusion.

It may be well to notice here another ambiguous expression which often leads to confusion. A "parol lease," or a "parol demise," is one not under seal, whether written or oral (verbal).<sup>23</sup>

An "express demise" may be either by a sealed instrument, by a written instrument not under seal, or by an oral lease.

It is somewhat surprising to find Mr. Taylor, or his editor, saying,<sup>24</sup> that in Massachusetts "the existence of an express demise was held a bar to an action of use and occupation;" and to find Mr. Wood saying,<sup>25</sup> "In Massachusetts, however, where there is a written lease, whether under seal or not, use and occupation does not lie."

Of the four cases cited in Taylor in support of the above statement, two, *Mann v. Brewer*,<sup>26</sup> and *Smiley v. McLaughlin*,<sup>27</sup> merely decide what is perfectly well settled, that the

<sup>20</sup> *Sibley v. Brown*, 4 Pick. 137, 139.

<sup>21</sup> Where a tenant holds over after the expiration of his lease, and he has become a tenant at will, he cannot be sued on the covenant even though there is a clause requiring the payment of rent "for such further time as the said lessees or any person or persons claiming under them, should hold, etc." *Leavitt v. Maykell*, 203 Mass. 506.

<sup>22</sup> *C. Allen, J.*, in *Rice v. Loomis*, 139 Mass. 303, citing G. L., c. 186, §§ 4, 5; R. L., c. 129, §§ 4, 5; Pub. St., c. 121, §§ 4, 5; *Kites v. Church*, 142 Mass. 586, 589.

<sup>23</sup> *Bouvier Law Dict.*; *Field, J.* in *Bowen v. Proprietors*, 137 Mass. 274, 275 (1884). See *Millard v. Baldwin*, 3 Gray, 484, 486. For an instance of the ambiguity, see remarks of *Chapman, J.* in *Warren v. Ferdinand*, 9 Allen, 357.

*Cp.* the confusion between "parol evidence," as oral evidence, and as extrinsic evidence.

<sup>24</sup> 2 Landl. & Ten., 9th ed., p. 253 n. 4.

<sup>25</sup> 2 Landl. & Ten., 2d ed., p. 1328 n. 1 (1888).

<sup>26</sup> 7 Allen, 202.

<sup>27</sup> 138 Mass. 363.

action will not lie where there is a lease under seal. In another, *Fuller v. Swett*,<sup>28</sup> the action was for use and occupation. It appeared there was a verbal lease, which had been determined, through the landlord's conveying the reversion, before any rent became due under it. The court held that no rent was due under the express agreement because of its terms, and that no agreement could be implied because there was an express agreement.<sup>29</sup> The case, therefore, does not seem to be any authority for the proposition that use and occupation would not lie on a verbal or a written lease, where anything was due under it. In the last case cited in *Taylor, Warren v. Ferdinand*,<sup>30</sup> the action was for use and occupation, and the defendant offered to prove a sealed lease, and was sustained in his position on exceptions. Chapman, J., said that before and since the practice act, use and occupation was the proper remedy to recover under "a parol demise." The first two cases and this last are also cited by Mr. Wood in support of his statement.

The only material authority in these cases seems to be the remarks of Chapman, J., in *Warren v. Ferdinand*. As above stated the word "parol" in the expression "parol demise" sometimes means *verbal*, and the opinion might therefore be considered ambiguous on this point. But in *Bowen v. Proprietors*<sup>31</sup> we have a case where there was a written agreement not under seal. The plaintiff declared for the rent of rooms upon an account annexed. Field, J., said, citing *Warren v. Ferdinand*: "Rent reserved in a written lease under seal cannot be declared for in an account annexed; but rent agreed to be paid under a parol demise, whether written or oral, as it was formerly recoverable under a general count for use and occupation, can now be recovered under a count on an account annexed."

<sup>28</sup> 6 Allen, 219 n.

<sup>29</sup> *Cp. Commercial Wharf Co. v. Boston*, 208 Mass. 482. In *Brooks v. Allen*, 146 Mass. 201, a firm composed of a lessee and another occupied premises, and the lease was afterwards avoided for fraud, although not until the firm had ceased to occupy. It was held that the rescission could not operate retroactively so as to make the firm liable for past use and occupation. *Barry v. Ryan*, 4 Gray, 523.

<sup>30</sup> 9 Allen, 357. *Gibson v. Kirk*, 1 Q. B. 850; 2 Chitty Pl., 16th Amer. Ed., 424.

<sup>31</sup> 137 Mass. 274 (1884).

The fact that a lease not under seal is valid as between the parties and those having notice of it,<sup>32</sup> has no effect upon the rule of pleading. Nor does the statutory provision,<sup>33</sup> requiring that written instruments declared on shall be set forth by copy or legal effect, alter the form of the action.

If the learned authors referred to mean to say that an action for use and occupation will not lie upon an implied contract where there is an express contract covering the matter, they are undoubtedly correct;<sup>34</sup> but the passages cited above are certainly misleading without further explanation.

## SECTION II

### ACTION FOR RENT<sup>35</sup>

§ 228. Statutory provisions.—The provisions regarding apportionment of rent as to the extent of the estate demised, and as to time, have been considered above.<sup>36</sup>

“If curtesy or dower is assigned out of such land [land leased for one hundred years or more, of which fifty years remain unexpired], the husband or widow and his or her assigns shall pay to the owner of the unexpired residue of the term one third of the rent reserved in the lease under which the wife or husband held the term.”<sup>37</sup>

<sup>32</sup> *Supra*, § 10.

<sup>33</sup> G. L., c. 231, § 7, cl. 11; R. L., c. 173, § 6, cl. 10; Pub. St., c. 167, § 2, cl. 9; Gen. St., c. 129, § 2, cl. 9; St. 1852, c. 312, § 2, cl. 9.

<sup>34</sup> See *infra*, § 255; *Barry v. Ryan*, 4 Gray, 523.

<sup>35</sup> As to the liability of a tenant of a mortgagor to pay rent to the mortgagee, see *supra*, §§ 6, 7.

As to liability in cases of assignment, see *supra*, §§ 47, 48, 50, 51, and in cases of sublease, *supra*, § 52.

That the covenant to pay rent runs with the land, see *supra*, § 55, and for the construction of this covenant, *supra*, §§ 59–64.

As to abatement of rent, see *supra*, §§ 83–86.

Forfeiture for non-payment of rent, *supra*, §§ 121–124.

Notice to quit for non-payment of rent, *supra*, §§ 145, 161.

Apportionment of rent, *supra*, §§ 222–225.

Payment of rent by a tenant at will, *supra*, § 158.

Payment of rent by a tenant at sufferance, *supra*, §§ 184, 185. And as to various defences to the action for rent, depending upon the rights of the tenant in regard to dependent and conditional covenants and implied covenants, see appropriate titles *supra*.

<sup>36</sup> §§ 224, 225.

<sup>37</sup> G. L., c. 186, § 2; R. L., c. 129, § 2; Pub. St., c. 121, § 2; Gen. St., c. 90,



"Tenants at sufferance in possession of land or tenements shall be liable to pay rent therefor for such time as they may occupy or detain the same." <sup>38</sup> If a lessee holds over after the expiration of his term, a new contract similar to the old may be implied, although the landlord has died.<sup>39</sup> But if he holds over without any agreement whatever, he is a tenant at sufferance, and not liable for rent as such, although now liable by statute for such time as he occupies.<sup>40</sup>

"Such rent may be recovered in contract, and the deed of demise or other written instrument, if any, showing the provisions of the lease, may be used in evidence by either party to prove the amount of rent due from the defendant." <sup>41</sup>

"Such action may be brought by or against executors and administrators for any arrears of rent accrued in the lifetime of the deceased parties, respectively, in the same manner as for debts due from or to the same parties in their lifetime on a personal contract." <sup>42</sup>

§ 22; Rev. St., c. 60, § 20; St. 1834, c. 162, § 3. Cited in *Reed v. Whitney*, 7 Gray, 533.

<sup>38</sup> G. L., c. 186, § 3; R. L., c. 129, § 3; Pub. St., c. 121, § 3; Gen. St., c. 90, § 25. Cited in *Flood v. Flood*, 1 Allen, 218; *Bunton v. Richardson*, 10 Allen 260; *Knowles v. Hull*, 99 Mass. 562; *Merrill v. Bullock*, 105 Mass. 491; *Durgin v. Busfield*, 114 Mass. 492; *Perkins v. Stockwell*, 131 Mass. 532; *Emmes v. Feeley*, 132 Mass. 346; *Porter v. Hubbard*, 134 Mass. 238; *Cummings v. Watson*, 149 Mass. 263; *Rice v. Loomis*, 139 Mass. 303; *Cofran v. Shepard*, 148 Mass. 583; *Warren v. Lyons*, 152 Mass. 311; *Brown v. Magorty*, 156 Mass. 210; *Devine v. Lord*, 175 Mass. 390; *Dixon v. Smith*, 181 Mass. 218; *Edwards v. Hale*, 9 Allen, 462; *Carpenter v. Allen*, 189 Mass. 246; *Smith v. Boyd*, 202 Mass. 28.

<sup>39</sup> *Brewer v. Knapp*, 1 Pick. 332; *Weston v. Weston*, 102 Mass. 514; *Jaques v. Gould*, 4 Cush. 384; *Bartholomew v. Chapin*, 10 Met. 1; *Davis v. Alden*, 2 Gray, 309; *Dimock v. Van Bergen*, 12 Allen, 551. *Cp.* *Salisbury v. Hale*, 12 Pick. 416; *Rice v. Loomis*, 139 Mass. 302.

<sup>40</sup> *Emmons v. Scudder*, 115 Mass. 367, 371, per Devens, J., citing *Merrill v. Bullock*, 105 Mass. 486. See further on this point and as to the common law rule, *supra*, § 184.

<sup>41</sup> G. L., c. 186, § 5; R. L., c. 129, § 5; Pub. St., c. 121, § 5; Gen. St., c. 90, § 26; Rev. St., c. 60, § 23. Cited in *Daniels v. Richardson*, 22 Pick. 569; *Campbell v. Stetson*, 2 Met. 504; *Earle v. Kingsbury*, 3 Cush. 208; *Merrill v. Bullock*, 105 Mass. 491; *Bunton v. Richardson*, 10 Allen, 260; *Emmons v. Scudder*, 115 Mass. 371; *Rice v. Loomis*, 139 Mass. 303; *Warren v. Lyons*, 152 Mass. 311.

<sup>42</sup> G. L., c. 186, § 6; R. L., c. 129, § 6; Pub. St., c. 121, § 6; Gen. St., c.

The following provision applies equally to cases of apportionment by statute and to the sections just cited above. "The six preceding sections shall not deprive landlords of any other legal remedy for the recovery of rents, whether secured by lease or by law." <sup>43</sup>

§ 229. **Rent as a necessary.**—"Debts for the rent of a dwelling house occupied by the debtor or his family, shall be considered as claims for necessities." <sup>44</sup> This section "cannot be regarded so much a provision for establishing, by a new and positive rule, that rent for a dwelling house for the use of the family of an insolvent debtor, shall be considered as a claim for necessities, as an explanatory and declaratory act defining the meaning of that expression where it is used in previous enactment." <sup>45</sup> But a claim for the rent of a house hired by a single woman without family, for the business of keeping a boarding-house, is not within the class of necessities intended by the statute; <sup>46</sup> nor is a lease of a dwelling house to several persons a contract for necessities. <sup>47</sup>

Where a judgment is for the entire amount of a declaration of which one count is for rent and another for interest upon the first count, the judgment is "founded upon a claim for necessities." <sup>48</sup>

§ 230. **Statute of limitations.**—The statute of limitations upon actions for arrears of rent, except upon leases under seal, is six years. <sup>49</sup> Upon leases under seal the period of limitation

90, § 27; Rev. St., c. 60, § 24. This section is declaratory of the common law. *Daniels v. Richardson*, 22 Pick. 565, 569, per Shaw, C. J.

<sup>43</sup> G. L., c. 186, § 7; R. L., c. 129, § 7; Pub. St., c. 121, § 7; Gen. St., c. 90, § 28; Rev. St., c. 60, § 25.

<sup>44</sup> G. L., c. 186, § 10; R. L., c. 129, § 10; Pub. St., c. 121, § 10; Gen. St., c. 90, § 29; St. 1859, c. 127. Cited in *Bell v. Tuttle*, 1 Allen, 219.

<sup>45</sup> *Bell v. Tuttle*, 1 Allen, 219. Both at common law, therefore, and under this statute, a discharge in insolvency under Pub. St., c. 157, § 84, did not bar a claim for such rent. *Cp. infra*, § 330. These decisions are still of value in regard to Poor Debtor Process, G. L., c. 224, §§ 1-70; and to Equitable Process after Judgment, G. L., c. 225, §§ 1, 11; *Brown's Case*, 173 Mass. 498.

<sup>46</sup> *Prentice v. Richards*, 8 Gray, 226.

<sup>47</sup> *Plympton v. Roberts*, 12 Allen, 366.

<sup>48</sup> *Danigan v. Williams*, 198 Mass. 457.

<sup>49</sup> G. L., c. 260, § 2; R. L., c. 202, § 2; Pub. St., c. 197, § 1, cl. 2; Gen. St., c. 155, § 1; Rev. St., c. 120, § 1; St. 1786, c. 52, § 1. Cited in *Buffum v. Deane*, 4 Gray, 385, 392.

*Historical.* The exception as to leases under seal was added by the Gen.

is twenty years.<sup>50</sup> Under our statutes the period of limitation is the same for any set-off to a claim for rent.<sup>51</sup>

§ 231. Parties.<sup>52</sup>—Beneficiaries.—“The general rule of law is, that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter; and the recent decisions in this Commonwealth and in England have tended to uphold the rule and to narrow the exceptions to it.”<sup>53</sup> This was the ancient English view,<sup>54</sup> and seems correct upon principle.<sup>55</sup>

An exception to this general rule was, however, made in the case of *Brewer v. Dyer*,<sup>56</sup> and has been repeatedly recognized in later cases.<sup>57</sup> In this case, a lessor under a sealed lease was allowed to sue for rent one who had agreed with the lessee, by an unsealed writing, to assume the lessee's obligations under the lease. The third person entered with the knowledge of the lessor, and paid rent to the latter for a time. The reasoning upon which the opinion proceeded is flatly overruled by the later decisions, but the point decided is apparently well established. “That case may perhaps be supported on the ground that such payment and receipt of the rent after the agreement between the defendant and the lessee warranted the inference of a direct promise by the

St., but the law was held to be the same under the Rev. St., on the analogy of the English St., 21 Jac. I, c. 16. *Buffum v. Deane*, 4 Gray, 385, 393.

<sup>50</sup> G. L., c. 260, § 1; R. L., c. 202, § 1; Pub. St., c. 197, § 7; Gen. St., c. 155, § 7; Rev. St., c. 120, § 7; St. 1786, c. 52, § 4.

<sup>51</sup> *Buffum v. Deane*, 4 Gray, 385, 394. See also as to set-off, *Witter v. Witter*, 10 Mass. 223; *Bridgham v. Tileston*, 5 Allen, 371.

<sup>52</sup> Parties to Leases, *supra*, §§ 22–33.

<sup>53</sup> *Exchange Bank v. Rice*, 107 Mass. 37, 41, per Gray, J., citing *Mellen v. Whipple*, 1 Gray, 317 (action by mortgagee v. vendee of equity on a promise by the latter to the vendor); *Millard v. Baldwin*, 3 Gray, 486 (where Metcalf, J., says the doctrine that a beneficiary may sue is confined to unsealed contracts); *Field v. Crawford*, 6 Gray, 116; *Dow v. Clark*, 7 Gray, 198; *Colburn v. Phillips*, 13 Gray, 64, 66; *Flint v. Pierce*, 99 Mass. 68.

<sup>54</sup> 1 Parsons on Contracts, 9th ed., 503.

<sup>55</sup> Langdell, Summary Con., §§ 62, 63. Cp. *Cabot v. Haskins*, 3 Pick. 83.

<sup>56</sup> 7 Cush. 337.

<sup>57</sup> E. g., cases in n. 53, *supra*.

defendant to the lessor to pay the rent to him for the residue of the term.”<sup>58</sup>

§ 231a. **Corporations.**—Where the right of action for breach of a contract of lease inheres in the corporation, it is the proper party to bring the action, even though under the terms of the lease, payments are to be made directly to the stockholders by the lessee.<sup>59</sup>

§ 232. **Execution creditor.**—We have already seen that, where part of an estate under lease is set off to a creditor of the lessor, by levy, the lessee is bound to pay to the creditor such part of the rent as shall be determined by appraisal.<sup>60</sup>

§ 233. **Executors, administrators, guardians, trustees.**—An executor or administrator holds upon the same terms and conditions as his testator or intestate,<sup>61</sup> and is liable for breaches of the covenant to pay rent, whether occurring before or after the testator’s death.<sup>62</sup> As to the liability and rights of guardians and trustees, see *supra*, §§ 26, 32.

Although in general the court will not regard fractions of a day, yet it will do so where it is necessary to determine whether rent is payable to the heirs or to the personal representatives of a deceased lessor.<sup>63</sup>

§ 234. **Joint parties.**—Where two jointly hire premises, and one occupies, such occupation is sufficient to make both liable for the rent in one action;<sup>64</sup> and, conversely, two landlords owning premises in common may maintain a joint action for rent.<sup>65</sup>

<sup>58</sup> Gray, J., in *Exchange Bank v. Rice*, 107 Mass. 37, 43.

<sup>59</sup> *West End St. Ry. Co. v. Malley*, 246 Fed. 625, 246 U. S. 671. (C. C. A., Mass.)

<sup>60</sup> *Supra*, § 224.

<sup>61</sup> *Bradford v. Patten*, 108 Mass. 153.

<sup>62</sup> *Greenleaf v. Allen*, 127 Mass. 248.

<sup>63</sup> *Hammond v. Thompson*, 168 Mass. 531, 533; *Ex parte Smyth*, 1 Swanst. 337, 343. *Cp. supra*, §§ 61, 185.

<sup>64</sup> *Kendall v. Carland*, 5 Cush. 74.

<sup>65</sup> *Wall v. Hinds*, 4 Gray, 256.

In this case, by a memorandum annexed to and forming part of the lease, the tenant agreed to pay half of the rent to each of the lessors separately. Bigelow, J., said, p. 268: “The effect of the memorandum was not to abrogate that covenant in the lease; but only to regulate the mode of payment and to prescribe the manner in which the lessee was to fulfil his covenant. . . . this does not make the previous covenant several, so as to change the remedy of the lessors for its breach into separate actions.”

A tenant in common of premises and a lessee thereof under a valid written lease cannot join in an action to recover rent from a tenant at sufferance, whose tenancy at will was terminated by the lease.<sup>66</sup>

One who, at his request, has been permitted by joint owners of real estate to enter into the use and occupation thereof, is liable to the survivors of the joint owners therefor, though he entered under a lease executed by only a portion of them.<sup>67</sup>

§ 235. **Mortgagees.**<sup>68</sup>—A mortgagee can sue a tenant for rent under a lease made before the mortgage;<sup>69</sup> and tenants under a lease made subsequent to the mortgage, after entry,<sup>70</sup> but not before entry.<sup>71</sup>

§ 236. **Partners.**—Where a lease was made to a firm consisting of four partners, and was signed and sealed by only two of them, but the firm entered and occupied under the lease, it was held an action for rent could be maintained against all the partners.<sup>72</sup> The court said: "An action could not be maintained on the covenants of the lease against the four defendants, because they did not execute it. It is argued that an action could not be maintained on the covenants of the lease against the two defendants who executed it, because it is said to be apparent that it was intended that all four of the defendants should execute it, and it does not purport to be a lease to two of the defendants. In such a case the indenture would take effect as a deed-poll, and a promise would be implied on the part of the defendants to perform the stipulations expressed in the indenture on their part to be performed. We think that the meaning of the agreed statement of facts is that the defendants, as a firm or partnership, accepted this lease and occupied the premises under it; and therefore the members of the firm became bound to pay rent, according to the stipulations of the lease,

<sup>66</sup> *Cofran v. Shepard*, 148 Mass. 582. See further as to the right of a lessee to recover from a tenant at sufferance who was a tenant at will before the lease, *supra*, § 184.

<sup>67</sup> *Codman v. Hall*, 9 Allen, 335.

<sup>68</sup> See *supra*, §§ 7, 8.

<sup>69</sup> *Burden v. Thayer*, 3 Met. 76, 79. *Cp. supra*, § 7.

<sup>70</sup> *Supra*, § 7.

<sup>71</sup> *Mayo v. Shattuck*, 14 Pick. 533. *Cp. supra*, § 7.

<sup>72</sup> *Burkhardt v. Yates*, 161 Mass. 591.

indicating that the guaranty is to continue only to the end of the first period. Thus, in one case, the guaranty was of payment "according to the terms of the lease, providing said lessee shall live to the end of the term." The court said: "If there had been no right of renewal, and if the guaranty had not continued the provision which it does, very possibly the defendant would have been liable if the tenant had held over."<sup>81</sup> But the proviso in the guaranty that the lessee shall live to the end of the term implies that the guaranty only extends to the end of the term; and we think that it should be taken in favor of the guarantor, that the term with which the guaranty ends is that which is spoken of as the term in the lease."<sup>82</sup>

A defect in the execution of the lease on the part of the lessee does not free the guarantor from liability, if the lessee accepts the lease and enters and occupies under it.<sup>83</sup> On the other hand, a forged guaranty entitles the lessor to avoid the lease.<sup>84</sup>

Where a lessor sues both lessee and guarantor, he must ordinarily elect at the trial which he will hold.<sup>85</sup> If he elects to sue the guarantor, the latter stands in the shoes of the lessee as regards defences, his collateral undertaking being as broad as the original undertaking.<sup>86</sup>

In an action against guarantors, who, by their contracts are severally and equally, but not jointly, liable, it is proper to describe the different contracts entered into by the several defendants in different counts in the same declaration.<sup>87</sup> Where a declaration against guarantors is on sealed guaranties, and it appears that the seals were affixed without authority, by a stranger, the lessor may sue as if no seals had been affixed, and may amend by adding counts upon unsealed guaranties.<sup>88</sup>

<sup>81</sup> *Rice v. Loomis*, 139 Mass. 302. See *Salisbury v. Hale*, 12 Pick. 416; *Warren v. Lyons*, 152 Mass. 310.

<sup>82</sup> *Woods v. Doherty*, 153 Mass. 558, per Holmes, J.

<sup>83</sup> *Clark v. Gordon*, 121 Mass. 330.

<sup>84</sup> *Brooks v. Allen*, 143 Mass. 201. See *supra*, §§ 35, 119.

<sup>85</sup> *Roth v. Adams*, 185 Mass. 341.

<sup>86</sup> *Ibid*; *Clark v. Gordon*, 121 Mass. 330; *Warren v. Lyons*, 152 Mass. 310.

<sup>87</sup> *Tulane University v. O'Connor*, 192 Mass. 428.

<sup>88</sup> *Ibid*.

§ 238. **Vendees.**<sup>89</sup>—A vendee of premises, where the vendor refuses to carry out the sale, is entitled to include in his damages the amount of rent which he would have been entitled to if the estate had been conveyed to him at the stipulated time.<sup>90</sup> He is, of course, entitled to all rent falling due after the sale, although for a period wholly or chiefly before the sale; but he is not entitled to rent in arrear at the time of the grant.<sup>91</sup>

§ 239. **No demand necessary.**—To maintain an action for rent, it is not necessary for the landlord to make any previous demand for payment; and this is so whether the amount is fixed by the terms of the lease,<sup>92</sup> or whether the amount has been left uncertain.<sup>93</sup> The reason of this is, that it is the tenant's duty to pay his rent without any notice from the lessor, for the tenant knows precisely when the rent is due and to whom it is payable. The frequent custom of collecting rent by an agent, who makes a demand for it upon the tenant, or in person, is, therefore, merely a matter of convenience. In theory, it is the tenant's duty to seek out his landlord and tender the amount due.

§ 240. **Pleading and practice.**—The proper way to declare for rent due according to the terms of a written lease under seal was until recently in an action of contract under a count setting forth the lease;<sup>94</sup> but a recent statute<sup>95</sup> provides that "In an action for the recovery of rent or of any sum of money payable by virtue of a contract under seal that might have been recovered upon a common count if the contract had not been under seal, the same may be recovered upon a common count in a form similar to that now used for other common counts. The bill of particulars in such cases shall refer to the document under which the claim arises, by its proper description and date."

<sup>89</sup> As to the liability of agreed vendees for rent see *supra*, § 157.

<sup>90</sup> *Warner v. Bacon*, 8 Gray, 397, 408.

<sup>91</sup> *Burden v. Thayer*, 3 Met. 76; *Codman v. American Piano Co.*, 229 Mass. 285, 289. Assumpsit will not lie by a vendee against his vendor for rent collected in advance according to the terms of the lease. If there is any remedy, it must be on the provisions of the contract of sale. *Stone v. Knight*, 23 Pick. 95, 97.

<sup>92</sup> *McGlynn v. Brock*, 111 Mass. 219; *Clarke v. Charter*, 128 Mass. 483.

<sup>93</sup> *Spaulding v. McOsker*, 7 Met. 8.

<sup>94</sup> *Warren v. Ferdinand*, 9 Allen, 357; *Burnham v. Roberts*, 103 Mass. 379.

<sup>95</sup> G. L., c. 231, § 7.



A count for use and occupation is improper,<sup>96</sup> and so is a count on an account annexed.<sup>97</sup> So is a declaration for "the rent" of the premises, not alleging it to be due under a written instrument.<sup>98</sup> If the declaration is defective for want of such an allegation, the plaintiff cannot give the lease in evidence;<sup>99</sup> on the other hand, if he improperly uses a count for use and occupation to describe a claim for rent, the defendant may prove the sealed lease under an answer containing simply a general denial.<sup>100</sup> In regard to the latter proposition the court has said: "The plaintiff contends that such a lease is a substantive fact which the defendant must allege in his answer in order to entitle him to offer it in evidence. But it is not to be so regarded, because its direct use is to sustain the defendant's denial of the plaintiff's allegations, whereas a substantive fact is a fact in the nature of confession and avoidance. A contrary construction would require of the defendant to allege the evidence by which he intended to sustain his denial of the plaintiff's allegations."<sup>101</sup>

The statute provides<sup>102</sup> that: "Written instruments shall be declared on by setting out a copy or such part as is relied on, or the legal effect thereof,<sup>103</sup> with proper averments to describe the cause of action. If the whole contract is not set out, a copy

<sup>96</sup> 1 Chitty Pl., 117, 377; *Warren v. Ferdinand*, 9 Allen, 357; *Smiley v. McLauthlin*, 138 Mass. 363; *Codman v. Jenkins*, 14 Mass. 93, 95, 98; *Browning v. Haskell*, 22 Pick. 310; *Bowen v. Proprietors*, 137 Mass. 274; *Hunt v. Thompson*, 2 Allen, 341, 343. *Cp.* *Richards v. Killam*, 10 Mass. 243; *Bogle v. Chase*, 117 Mass. 273.

<sup>97</sup> *Bowen v. Proprietors*, 137 Mass. 274.

<sup>98</sup> *Burnham v. Roberts*, 103 Mass. 379.

This is still law, for G. L., c. 231, § 7, requires a reference to the document under which the claim arises.

<sup>99</sup> *Ibid.*

At common law in a declaration in debt for rent on a demise, it was sufficient to state a demise for any number of years without averring it to have been in writing. See *Duppa v. Mayo*, 1 Saunders, 276 (6th edition).

<sup>100</sup> *Warren v. Ferdinand*, 9 Allen, 357.

<sup>101</sup> *Warren v. Ferdinand*, 9 Allen, 357, per Chapman, J., citing *Knapp v. Slocomb*, 9 Gray, 73; *Very v. Small*, 16 Gray, 121.

<sup>102</sup> G. L., c. 231, § 7, cl. 11; R. L., c. 173, § 6, cl. 10; Pub. St., c. 167, § 2, cl. 9; Gen. St., c. 129, § 2, cl. 9; St. 1852, c. 312, § 2, cl. 9.

<sup>103</sup> *Warren v. Ferdinand*, 9 Allen, 357. *Cp.* *Higgins v. McDonnell*, 16 Gray, 386; *Suffolk Bank v. Lowell Bank*, 8 Allen, 357; *Clary v. Thomas*, 103 Mass. 44.



or the original, as the court may direct, shall be filed upon motion of the defendant. If it is necessary and the court so orders, the copy so filed shall be part of the record as if oyer had been granted of a deed declared on according to common law. No profert or excuse therefor need be inserted in a declaration. If the instrument relied on is lost or destroyed, or if it is not within the control of the party relying on it, the substance thereof, as nearly as may be, and the reason why a copy is not given, shall be stated." This statute does not require that instruments not the foundation of the action should be set forth even though they may be a necessary part of the evidence.<sup>104</sup> Where the declaration is on a common count for rent, and not in covenant, it is enough to refer by description and date to the document under which the claim arises.<sup>105</sup>

If the declaration alleges that the lease bore a certain date and was for a certain term from that date, and claims unpaid rent for a certain period from that date, and the plaintiff is unable to prove the date, a verdict is rightly ordered for the defendant, as these averments are descriptive of the contract sued upon.<sup>105a</sup> But, if a recovery could have been had but for the allegation of the date, the matter may be cured by an amendment.<sup>106</sup> A motion to make such an amendment should be addressed to the lower court.<sup>107</sup>

An averment in a declaration that the defendant "elected to continue in the occupancy of the premises" mentioned in a written lease, for an additional term "upon the terms and provisions therein mentioned," is a sufficient allegation that the lessee elected to hold for the additional term.<sup>108</sup> If the landlord, having brought suit for rent due, accepts the amount of rent previously due, he is not entitled to recover costs in the suit; for such acceptance has discharged the cause of action; and the same is true of interest.<sup>109</sup> So, if suit is brought by the lessor for part of the rent due for a

<sup>104</sup> *Troy & Greenfield R. R. Co. v. Newton*, 1 Gray, 544, 546 (subscription paper for stock); *Bernard v. Cafferty*, 11 Gray, 10 (process or judgment in malicious prosecution).

<sup>105</sup> G. L., c. 231, § 7. Quoted *supra* in this section.

<sup>105a</sup> *Locke v. Kennedy*, 171 Mass. 204.

<sup>106</sup> *Ibid.*; *Birmbaum v. Crowninshield*, 137 Mass. 177.

<sup>107</sup> *Locke v. Kennedy*, 171 Mass. 204.

<sup>108</sup> *Kramer v. Cook*, 7 Gray, 550.

<sup>109</sup> *Davis v. Harrington*, 160 Mass. 278.

quarter, he cannot afterward bring a separate action for the balance.<sup>110</sup>

If the lessor has sued for rent due for part of the rental period and has recovered judgment, such judgment may be given in evidence under the general issue.<sup>111</sup>

Where the action is by the lessor against an assignee, mesne assignments need not be set forth in the declaration;<sup>112</sup> but when the action is by the assignee, his right to recover depends upon the validity of any mesne assignments and the assignment to himself, and these must therefore be fully set out.<sup>113</sup>

It is provided by statute that "Every action for rent, use and occupation or breach of covenant shall be considered a transitory action."<sup>114</sup>

As the lessee is liable to the lessor, so of course he may be summoned as trustee of the lessor for the amount of rent due at the time he is summoned.<sup>115</sup>

As to a declaration against guarantors severally liable, see *supra*, § 237.

§ 241. Evidence.—The provisions of the lease, *i. e.*, the contract made by the parties themselves, is of course in general the best evidence of the amount of rent to be paid; and we have already seen that, in certain cases, by statute the provisions of the lease may be used in evidence by either party to prove the amount of rent due from the defendant.<sup>116</sup>

There is no presumption that a lease was executed in duplicate; therefore, where a lease is in the possession of a lessee who is out of the jurisdiction, the court may allow secondary evidence of its contents, without any notice to the lessor

<sup>110</sup> Warren *v.* Comings, 6 Cush. 103, and at common law it was immaterial that the form of the second action was different from the first.

<sup>111</sup> Warren *v.* Comings, 6 Cush. 103.

<sup>112</sup> Pitt *v.* Russell, 3 Lev. 19.

<sup>113</sup> Esp. N. P. 220.

<sup>114</sup> G. L., c. 223, § 3.

Formerly, where it was founded on privity of estate, as in the case of actions by or against assignees of the contracting parties, it was local. 2 Taylor, Landl. & Ten., 9th ed., § 625; Chitty on Pleading, 282, 283; Walker's Case, 3 Co. 24; Lienow *v.* Ellis, 6 Mass. 331; Clark *v.* Scudder, 6 Gray, 122. See G. L., c. 223, §§ 1, 15; R. L., c. 167, §§ 1-14; Pub. St., c. 161, §§ 1-12; St. 1893, c. 396, § 13; St. 1894, c. 398; St. 1887, c. 347.

<sup>115</sup> Wood *v.* Partridge, 11 Mass. 488. *Cp.* Cox *v.* Central Vermont R. Co., 187 Mass. 596.

<sup>116</sup> G. L., c. 186, § 5; R. L., c. 129, § 5; Pub. St., c. 121, § 5, cited *supra*.

to produce it.<sup>117</sup> But, if a lease is executed in duplicate, one who is sued on it cannot be allowed to prove its contents by extrinsic evidence merely on showing that he has lost his own copy, if he makes no attempt to procure the duplicate original and does not summon the lessee, who lives near at hand.<sup>118</sup>

We have also seen that the lease is not admissible as evidence for the plaintiff unless it is properly alleged in the declaration, but that it may be offered in evidence by the defendant under an answer containing simply a general denial.<sup>119</sup>

The written lease cannot be contradicted by evidence to show that the annual value of the leased premises is less than the rent reserved;<sup>120</sup> and where one has admitted the execution of a lease he cannot give evidence that he had not seen its provisions.<sup>121</sup> So, a lease cannot be varied by showing that, before the execution of the lease, there was a verbal agreement that if, during the term, the lessee should lease another store from the lessor, the latter should waive his rights under the first lease, the agreement not being as to a collateral matter.<sup>122</sup>

"Evidences, by receipt, of the payment of a subsequent quarter's rent will be considered *prima facie* evidence of the payment for all former quarters." <sup>123</sup>

In the case of a lease for a certain term at a certain rent, and, at the election of the tenant for a further term, paying an increased rent, the election of the lessee to hold for the further term at the increased rent may be inferred from his continuing to occupy the premises and paying instalments of rent at the increased rate, without proof of any formal election or notice to the lessor at the time of the expiration of the first term.<sup>124</sup> And the same evidence is competent for the same purpose in an action against the guarantor.<sup>125</sup>

Where the lessee may have his lease extended for a certain period upon giving a certain notice, and he dies before the

<sup>117</sup> *Cooley v. Collins*, 186 Mass. 507.

<sup>118</sup> *Peaks v. Cobb*, 192 Mass. 196.

<sup>119</sup> *Supra*, § 240.

<sup>120</sup> *Howland v. Coffin*, 12 Pick. 125.

<sup>121</sup> *Kimball v. Cross*, 136 Mass. 300.

<sup>122</sup> *Taylor v. Goding*, 182 Mass. 231.

<sup>123</sup> *Brewer v. Knapp*, 1 Pick. 332, 336. *Parker, C. J.*

<sup>124</sup> *Kramer v. Cook*, 7 Gray, 550.

<sup>125</sup> *Salisbury v. Hale*, 12 Pick. 416.

time provided for giving such notice, but his widow continues to occupy after the term, and his administrator pays the rent, no notice being given, it is a question of fact whether there has been an election to hold for the additional term.<sup>126</sup>

"These provisions gave the lessee the right to have the term extended upon giving notice thereof to the lessor, . . . were conditions precedent to the extension of the term. If he failed to perform these conditions the term expired by its own limitation . . . the lease then became inoperative, and the lessor was entitled to the possession of the premises. It may be that the lessor might waive the provisions as to notice to her; but . . . it is still incumbent upon her to prove that he elected to hold the premises for the extended term."<sup>127</sup>

Under an agreement that the lessee may retain certain sums from the rent, being the cost of certain repairs, "the lessee to exhibit bills as vouchers, satisfactory to the lessor," the lessee must present receipted bills. "They would be useful to the lessor. Certainly they would be an important protection to him against mechanics' liens."<sup>128</sup>

Evidence of an oral agreement, contemporaneous with the making of a lease, that the lessee might surrender the premises at any time, cannot be offered by the lessee to prove such agreement, but may be used to show facts which the lessee claims constituted a surrender.<sup>129</sup> Similarly, the record of an action in summary process brought by the lessor against the lessee's sub-tenant during the time for which the rent is claimed, is competent evidence upon the issue whether there has been a surrender of the lease and a substitution of the sub-tenant in the place of the lessee.<sup>130</sup>

Evidence that a landlord did not do certain things or make certain repairs is rightly excluded, if offered as a defence to the action for rent, if the landlord is not bound to do the things or make the repairs; as, for example, not shoring up foundation walls of his building upon notice from the adjoining owner of his intention to rebuild, in accordance with an alleged local

<sup>126</sup> *Bradford v. Patten*, 108 Mass. 153.

<sup>127</sup> *Ibid.*, per Morton, J.

<sup>128</sup> *Burnham v. Roberts*, 103 Mass. 379, per Chapman, C. J.

<sup>129</sup> *McGlynn v. Brock*, 111 Mass. 219. *Cp.* *Taylor v. Goding*, 182 Mass. 231, cited *supra*.

<sup>130</sup> *Amory v. Kannoisky*, 117 Mass. 351. *Cp.* *Eddy v. Coffin*, 149 Mass. 463, cited *infra*, § 256.

custom; and allowing a partition wall to sag so as to render the tenement uninhabitable.<sup>131</sup>

Where the lessee urges a substituted tenancy as a defence, and the lessor claims that in collecting rents from another person he acted as agent for the lessee, the lessor cannot put in evidence his own account book to show to whom he credited the payments of rent.<sup>132</sup>

§ 242. Defenses.<sup>133</sup>—Enjoyment precedent to liability.<sup>134</sup>—Rent does not become a debt from the lessee to the lessor until the premises have been enjoyed.<sup>135</sup>

The reason of this has been given by the court as follows: "Rent is a sum stipulated to be paid for the actual use and enjoyment of another's land, and is supposed to come out of the profits of the estate. The actual enjoyment of the land is the consideration for the rent which is to be paid, and, therefore, if the lessee is evicted before the rent becomes due, in whole or in part, it is a good answer to a claim for rent by an action of debt or covenant, or by distress.<sup>136</sup> From this it seems clear that, although there be a lease, which may result in a claim for rent, which will constitute a debt, yet no debt accrues until such enjoyment has been had; because, says Lord Coke, in discussing the effect of a release, a debt is merely a thing in action, and, therefore, if a man be bound to the payment of a debt, at a future time, a release of all actions by the obligee is a perpetual bar."<sup>137</sup> In this case, land was leased to a corporation, the stockholders of which were personally liable, under St. 1826, c. 137, § 1, after ceasing to be such, for any debt contracted by such corporation, or any debts so contracted which might have accrued while they were stockholders. It was held that no action could be maintained against a stockholder for the rent of a quarter which had commenced after he had sold out his shares, although the lease was executed before such sale.

<sup>131</sup> *Kramer v. Cook*, 7 Gray, 550. See *Pratt v. Grafton Electric Co.*, 182 Mass. 180. *Cp. infra*, § 249.

<sup>132</sup> *Cooley v. Collins*, 186 Mass. 507.

<sup>133</sup> *Cp. infra*, §§ 264–270. See also the various covenants and sub-titles.

<sup>134</sup> *Cp. Eviction, infra*, §§ 245, 267.

<sup>135</sup> *Bordman v. Osborn*, 23 Pick. 295; *Smith v. Shepard*, 15 Pick. 147, 150; *Moore v. Mansfield*, 182 Mass. 302 (use and occupation). *Cf. Weed v. Crocker*, 13 Gray, 219; *Papanastos v. Heller*, 227 Mass. 74.

<sup>136</sup> 1 Saunders, 204 n.

<sup>137</sup> Shaw, C. J., in *Bordman v. Osborn*, 23 Pick. 295, 299.

So also, "a covenant to pay rent quarterly creates no debt or legal demand for the rent until the time stipulated for payment arrives. The rent may *never* become due. The lessee may quit the premises with the consent of the lessor; or he may assign over his term with such consent, so as to discharge himself from rent,<sup>138</sup> or he may be evicted by a title paramount to that of his lessor; in either of which cases he will be discharged from the operation of his covenants. It is not the case of *debitum in presenti solvendum in futuro*, which is subject to attachment by the statute; but is a contingency which cannot be attached."<sup>139</sup>

But "enjoyment" under this rule does not imply or require actual occupation. It is sufficient if the tenant has had an opportunity to enjoy the use of the premises, whether he makes any actual use of them in person or by his servants or agents, or whether he makes no use of them.<sup>140</sup> It is not even necessary for the lessee to enter, for the covenant to pay rent begins to operate as soon as the specified date for the beginning of the term arrives.<sup>141</sup> If there be a joint lease to two as tenants in common, occupation by one is sufficient to make both liable.<sup>142</sup> It is no defence to an action for rent that the premises have been occupied by another than the lessee, who has paid instalments of rent falling due prior to that sued for.<sup>143</sup>

Defects in the execution of the lease are no defence, where the lessee has occupied and enjoyed the premises;<sup>144</sup> even though a board of health may have condemned the premises as dangerous and unfit for habitation.<sup>145</sup>

<sup>138</sup> *Randall v. Rich*, 11 Mass. 494.

<sup>139</sup> *Parker, C. J.*, in *Wood v. Partridge*, 11 Mass. 488, 492, citing on the last point *Davis v. Ham*, 3 Mass. 33, and *Wentworth v. Whittemore*, 1 Mass. 471. *Cp. infra*, §§ 327-328.

<sup>140</sup> *McGlynn v. Brock*, 111 Mass. 219; *Buffington v. McNally*, 192 Mass. 198. Similarly, in regard to the action for use and occupation. "If the defendant actually *holds*, though he does not actually occupy, the action may be maintained against him." *Walker v. Furbush*, 11 Cush. 366, 368, *Metcalf, J.* *Cp. supra*, §§ 152, 155.

<sup>141</sup> *Taylor, Landl. & Ten.*, 9th ed., §§ 15, 624.

<sup>142</sup> *Kendall v. Carland*, 5 Cush. 74.

<sup>143</sup> *McGlynn v. Brock*, 111 Mass. 219.

<sup>144</sup> *Kabley v. Worcester Gas Light Co.*, 102 Mass. 392; *Clark v. Gordon*, 121 Mass. 330; *Codman v. Hall*, 9 Allen, 335; *Burkhardt v. Yates*, 161 Mass. 591. *Cp. supra*, §§ 10, 13, 20, 24, 28, 31, 44.

<sup>145</sup> *Roth v. Adams*, 185 Mass. 341. *Cp. Pratt v. Grafton Electric Co.*, 182 Mass. 180.

Thus, if rent is to be payable when possession is given free of incumbrances, and the lessee enters and acts under the lease, he cannot allege that there are incumbrances.<sup>146</sup> So also, if he knows certain portions of the premises will not be delivered, he waives the precise terms of the lease by occupying.<sup>147</sup> Similarly, he cannot allege that the lease is void because of uncertainty as to the subject matter.<sup>148</sup>

Rent accrues on the last day of the term, although by agreement it may not be payable until the next day.<sup>149</sup> In the absence of any evidence that it is to be paid at more frequent intervals, it is payable yearly.<sup>150</sup>

Where rent is payable in advance, and, during the period for which a payment of rent has been payable, the lessor terminates the tenancy, the rent not being apportionable, and the full equivalent consideration not being received, the right to collect for the period is irrevocably lost.<sup>151</sup>

It is no defence that, where the lease specifies that premises are to be used for a particular purpose, the lessee is disabled from using them for that purpose.<sup>152</sup>

§ 243. **Arbitration.**—An arbitration clause in a lease is no defence to an action for rent brought where there is no offer to submit to arbitration.<sup>153</sup>

§ 244. **Breach of covenant.**—It is no defense to the action for rent that the landlord has failed to perform a covenant on his part, such as to repair, unless such failure is in respect to some covenant precedent to the lessee's liability for rent, or amounts to an eviction.<sup>154</sup> Evidence of such failure is therefore not admissible.<sup>155</sup>

<sup>146</sup> *Ober v. Brooks*, 162 Mass. 102.

<sup>147</sup> *Moore v. Mansfield*, 182 Mass. 302.

<sup>148</sup> *Appleton v. O'Donnell*, 173 Mass. 398.

<sup>149</sup> *Hammond v. Thompson*, 168 Mass. 531; *Bay State Bank v. Kiley*, 14 Gray, 493.

<sup>150</sup> *Warren v. Comings*, 6 Cush. 103.

<sup>151</sup> *Hall v. Middleby*, 197 Mass. 485; *Sutton v. Goodman*, 194 Mass. 389.

<sup>152</sup> *Gaston v. Gordon*, 208 Mass. 265 (lease for liquor store, lessee unable to obtain a license); *Barnett v. Clark*, 225 Mass. 185 (garage law altered during term).

*Cf. Boston & Worcester R. R. Co. v. Ripley*, 13 Allen, 421.

<sup>153</sup> *Rowe v. Williams*, 97 Mass. 163.

<sup>154</sup> See *Dependent and Independent Covenants*, *supra*, § 58; *Royce v. Guggenheim*, 106 Mass. 201, 203; *Leavitt v. Fletcher*, 10 Allen, 119, 121.

<sup>155</sup> *Kramer v. Cook*, 7 Gray, 550. See *supra*, § 241, and *infra*, § 249.



§ 245. **Eviction.**<sup>156</sup>—An eviction from premises is a good defence to an action for rent for a period beginning after the tenant's exclusion.<sup>157</sup> Where the tenant does not have an opportunity to use the whole of the premises demised, he does not get the whole consideration for his covenants, and the general principle above stated applies. Therefore, where the rent is to be paid for the use of both realty and personalty, and the lessee has but the use of one, he is liable but for a proportionate part of the rent.<sup>158</sup> So, where a portion of the estate demised is conveyed away, leaving the tenant in possession of the remaining portion, "the amount of rent to be paid is not to be determined by 'the proportion which the unconveyed portion bore to the whole estate,' but is the sum which the jury find the use and occupation of that [remaining] portion for that time were reasonably worth."<sup>159</sup>

Conversely, where there has been no interruption by the landlord of the peaceable possession and beneficial use of the property by the tenant, the latter cannot recoup damages in an action for rent.<sup>160</sup>

As has been said, a tenant who has covenanted to pay monthly or quarterly, is liable only for so many months' or quarters' rent as are due at the time of commencing suit,<sup>161</sup> therefore where the lessee is evicted before the first day of payment, no rent whatever can be recovered.<sup>162</sup> But, if one having no right of possession enter upon a tenant, he is not obliged to yield and is

<sup>156</sup> *Cp. supra*, §§ 141-144.

<sup>157</sup> *Smith v. Tennyson*, 219 Mass. 508; *Boston Veterinary Hospital v. Kiley*, 219 Mass. 533; *Nesson v. Adams*, 212 Mass. 429.

<sup>158</sup> *Buffum v. Deane*, 4 Gray, 385. In this case, mills and machinery had been leased for an entire rent, and so much as was real property was sold under an execution against the lessor.

*Cp. supra*, §§ 83-86, 222-225.

<sup>159</sup> *Emmes v. Feeley*, 132 Mass. 346, Field, J. See Apportionment, *supra*, § 224.

Distinguish the case where, owing to the landlord's own fault causing a partial eviction, he is allowed to recover neither on an express contract nor on a quantum meruit. *Moore v. Mansfield*, 182 Mass. 302 (case of use and occupation).

<sup>160</sup> *Taylor v. Finnegan*, 189 Mass. 568. *Cp. Voss v. Sylvester*, 203 Mass. 233, where the use by other tenants of a platform rendering a shop less beneficial to a tenant was held not to give him any cause of action.

<sup>161</sup> *Wood v. Partridge*, 11 Mass. 488; *Earle v. Kingsbury*, 3 Cush. 206.

<sup>162</sup> *Fitchburg Cotton Corp. v. Melven*, 15 Mass. 268.



liable upon his covenant to pay rent as usual.<sup>163</sup> Rent, whether payable in advance or not, is payable at any hour of the day of payment, and therefore an eviction during that day is a defence to an action for such rent.<sup>164</sup> And a forfeiture for non-payment of rent, enforced by the landlord during the period for which rent is payable in advance, destroys his right to such rent.<sup>165</sup>

§ 246. *Fraud*.—The fact that a tenant is induced to execute a lease by fraudulent misrepresentations of the plaintiff as to a material point in the construction of the demised premises, is a good defence to an action for rent, even though the tenant has entered and occupied, if he leaves as soon as the fraud is discovered;<sup>166</sup> *aliter*, if he does nothing toward rescinding the contract.<sup>167</sup> Thus, it has been held that a statement by the lessor, that a house “was built according to the plans in every particular,” made in answer to a question by the lessee whether “the drains were where they were to be, according to the plans,” might be found to be a false representation. It was also held that conversations between the parties at the time of executing the lease were admissible in evidence.<sup>168</sup>

§ 247. *Illegal use*.<sup>169</sup>—The tenant cannot plead that, without the knowledge of his lessor, he has used the premises for an illegal purpose.<sup>170</sup> Thus the court said, in one case, in regard to the statute making a lease void for the illegal use of premises:<sup>171</sup> “The sole object of the enactment was for the benefit and protection of the lessor, to enable him to get rid of a tenant who was using the demised premises for an unlawful purpose, and to avoid the penalty imposed by the

<sup>163</sup> *Austin v. Kimball*, 167 Mass. 300; *Morse v. Goddard*, 13 Met. 177.

<sup>164</sup> *Smith v. Shepard*, 15 Pick. 147; *Hammond v. Thompson*, 168 Mass. 531; *Hall v. Middleby*, 197 Mass. 485, 489.

*Historical*. “As the law formerly stood, rent was payable at such a convenient time before sunset on the day it fell due as would be sufficient to have the money counted.” *Hammond v. Thompson*, 168 Mass. 531.

<sup>165</sup> *Sutton v. Goodman*, 194 Mass. 389, 395. Query whether this decision is right.

<sup>166</sup> *Milliken v. Thorndike*, 103 Mass. 382.

<sup>167</sup> See *Hall v. Ryder*, 152 Mass. 528. Cp. *Browning v. Haskell*, 22 Pick. 310; *O'Malley v. Grady*, 222 Mass. 202.

<sup>168</sup> *Milliken v. Thorndike*, 103 Mass. 383.

<sup>169</sup> See *supra*, §§ 128–132.

<sup>170</sup> *Way v. Reed*, 6 Allen, 364, 370.

<sup>171</sup> G. L., c. 139, § 19; R. L., c. 101, § 10.

following section on a lessor who knowingly permits his estate to be occupied for a purpose prohibited by law. It would be a perversion of the plain intent of the statute to construe it as affording a ground of defence to a claim for rent of premises under a lease which was not made with any design on the part of the lessor, that they should be appropriated to an illegal use. . . . To deprive the lessor of his right to recover rent, it would be necessary to show actual and not merely constructive knowledge of the illegal occupation of the demised premises." <sup>172</sup>

§ 248. **Payment.**—If the lessee has paid rent in advance, and the lessor assigns his interest, the lessee is not liable for the same rent to the grantee of the land, subject to the lease, even though the latter takes without notice of such payment. <sup>173</sup>

A lessor who accepts the amount of rent due, whether before or after suit brought for the same, is not entitled to a judgment for interest by way of damages or failure to pay the rent at the proper time. <sup>174</sup> Similarly, if the landlord brings a suit for part of the rent due for a quarter, he cannot afterward bring a separate action for the balance. <sup>175</sup>

§ 249. **Repairs.**—In the absence of a covenant to that effect, a landlord is not bound to repair, and a failure to do so cannot be used as a defence to an action for rent. <sup>176</sup>

Even where there is an express covenant to repair, a failure will not be a defence to an action for rent unless it amounts to an eviction, as the covenants are independent. <sup>177</sup>

§ 250. **Subsequent agreement.**—Though the amount to be recovered is ordinarily governed by the terms of the written lease, the lessee may show that, after the delivery of the lease,

<sup>172</sup> *Way v. Reed*, 6 Allen, 364, 370, per Bigelow, C. J.

<sup>173</sup> *Stone v. Patterson*, 19 Pick. 476; *Farley v. Thompson*, 15 Mass. 18. See *supra*, § 53.

<sup>174</sup> *Davis v. Harrington*, 160 Mass. 278.

<sup>175</sup> *Warren v. Comings*, 6 Cush. 103.

<sup>176</sup> *Kramer v. Cook*, 7 Gray, 550; *Roth v. Adams*, 185 Mass. 341; *Foster v. Peyser*, 9 Cush. 242, 246; *Welles v. Castles*, 3 Gray, 323, 326; *Szathmary v. Adams*, 166 Mass. 145; *Taylor v. Finnigan*, 189 Mass. 568, 575. See *Pratt v. Grafton Electric Company*, 182 Mass. 180. See also *supra*, §§ 198–201, also §§ 71–74.

<sup>177</sup> *Royce v. Guggenheim*, 106 Mass. 201, 203; *Leavitt v. Fletcher*, 10 Allen, 119, 121; *Emmons v. Scudder*, 115 Mass. 367. *Cp. supra*, § 244.

the lessor, for a good consideration, orally agreed that the rent should be reduced for the future.<sup>178</sup>

On the other hand, when a written lease of a wooden house to be built for a tenant is orally modified so that the tenant is to occupy a brick house at an increased rent, and he enters and occupies, he is liable as a tenant at will by force of G. L., c. 183, § 3; <sup>179</sup> and perhaps also on the doctrine of substituted performance with a new consideration.<sup>180</sup>

But it has also been held that a written contract, before breach, may be varied by a subsequent oral agreement, made on a sufficient consideration, as to the terms of it which are to be observed in the future. Such a subsequent oral agreement may enlarge the time of performance, or may vary any other terms of the contract, or may waive and discharge it altogether,<sup>181</sup> and this rule applies although the original contract falls within the statute of frauds.<sup>182</sup>

Therefore it has been held that a lease may be modified by a subsequent oral agreement by the lessor, made in consideration that the lessee should not terminate the lease by a notice under its provisions, to furnish the lessee's apartment with the proper and necessary supply of heat and hot water, and that, in the event of a failure to do so, the lessee should not be liable under the lease. Such agreement is not within the statute of frauds, and may be shown as a matter of defence.<sup>183</sup>

§ 251. Substituted tenancy.—Where a lessee claims that another was substituted for him, it is open to the lessor to show that in collecting rent from the other person he acted as agent for the lessee and continued to treat the lessee as tenant.<sup>184</sup>

So, where there was a lease to A and B, and a later lease to A made before the expiration of the former lease, and it was provided that payments under the old lease were to be credited under the new, it was held that B was still liable under the old lease, and that A in collecting from B might be acting as agent for the lessor, and in paying rent under the new lease after a

<sup>178</sup> *Hastings v. Lovejoy*, 140 Mass. 261.

<sup>179</sup> *Freedman v. Gordon*, 220 Mass. 324.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Hastings v. Lovejoy*, 140 Mass. 261, 264.

<sup>182</sup> *Conroy v. Toomay*, 234 Mass. 384, 386; *Cummings v. Arnold*, 3 Met. 486; *Stearns v. Hall*, 9 Cush. 31.

<sup>183</sup> *Conroy v. Toomay*, 234 Mass. 384.

<sup>184</sup> *Cooley v. Collins*, 186 Mass. 507.

default by B, A might be paying an obligation of his late firm.<sup>185</sup>

§ 252. Surrender.—If the lessor brings an action against the lessee for a quarter's rent, and there is evidence that, before the end of the quarter, the lessee left the premises and authorized the lessor to enter and to fit them for a new tenant, it is a question for the jury whether there is any contract to apportion the rent.<sup>186</sup>

The burden of proving a surrender is always on the defendant.<sup>187</sup>

It seems that a surrender can be proved under a general denial; as it shows that the cause of action never arose, not that it arose and was subsequently avoided.<sup>188</sup>

§ 252a. Ultra Vires.<sup>189</sup>—Where a lease is ultra vires as made by a mayor and city council as lessees, the lessor is charged with notice of the limitation of their powers, and can maintain no action on the lease.<sup>190</sup>

§ 253. Tender.—As to tender, see *supra*, §§ 121 and 145; also G. L., c. 232, §§ 12, 13.

§ 254. Set-off and recoupment.—As we have seen, the period of limitation is the same on a set-off as on a claim for rent.<sup>191</sup> The subject of a set-off must be an obligation between the same parties. Thus, a lessee cannot set off a debt due from his lessor against a claim for rent by the vendee of the lessor, where the debt was contracted after the sale.<sup>192</sup> Similarly, a lessee cannot set off a debt due from a partnership consisting of some of his lessors and a stranger.<sup>193</sup> Nor can he set off a claim like that for water rates, which he has paid, where the lease is silent upon the subject, as the landlord is not ultimately liable to pay them.<sup>194</sup> A set-off to the full amount of rent due,

<sup>185</sup> *Shea v. McCauliff*, 186 Mass. 569.

<sup>186</sup> *Blake v. Sanderson*, 1 Gray, 332.

<sup>187</sup> *Taylor v. Kennedy*, 228 Mass. 390, 392.

<sup>188</sup> *Boynton v. Bodwell*, 113 Mass. 531. This was a case of notice to quit by a tenant at will which was defective, but the defect was waived. Surrender need not be pleaded to a count for use and occupation. *Dodd v. Acklon*, 6 M. & G. 672; *Walls v. Atchison*, 3 Bing. 462.

<sup>189</sup> See *Municipal Corporations*, *supra*, § 30a.

<sup>190</sup> *Commercial Wharf Co. v. Boston*, 208 Mass. 482.

<sup>191</sup> *Supra*, § 230.

<sup>192</sup> *Buffum v. Deane*, 4 Gray, 385. See *Witter v. Witter*, 10 Mass. 223.

<sup>193</sup> *Bridgham v. Tileston*, 5 Allen, 371.

<sup>194</sup> *Leighton v. Ricker*, 173 Mass. 564.

while a bar to the action for rent, does not prevent a re-ëntry by the landlord.<sup>196</sup>

Recoupment also can only be of an obligation between the same parties.<sup>196</sup> Thus, when a lessor agreed not to sell certain articles in a neighboring store during the term of the lease, and the lessee had transferred all his business to a corporation of which he was manager and of which he owned nearly all the capital, it was held that the lessee could recoup only nominal damages for the lessor's breach of covenant; and that the indirect loss suffered by him as manager and stockholder was too remote.<sup>197</sup>

If, however, the lessor has been guilty of a breach of covenant during the term, the amount of his recovery in an action for rent is liable to be cut down through recoupment for damages for such breach; but this defence is a privilege of the tenant, and he is not obliged to plead it.<sup>198</sup> The tenant cannot recoup damages occasioned by trespasses upon the estate by the lessor, which do not amount to an eviction.<sup>199</sup>

Nor can he recoup for breaches of covenant and at the same time deny that the covenant to pay rent is in force.<sup>200</sup> Nor can he recoup damages occasioned by third persons, if the lessor is not at fault.<sup>201</sup>

Mere disagreeable action on the part of the landlord, such as gambling in his office which formed part of a suite with the tenant's office, or having disreputable persons visit him does not interrupt the tenant's possession, and is not a ground of recoupment.<sup>202</sup>

<sup>196</sup> *Fillebrown v. Hoar*, 124 Mass. 580, 584.

<sup>198</sup> *Thresher v. Simpson*, 223 Mass. 349.

<sup>197</sup> *Ibid.*

<sup>199</sup> *Riley v. Hale*, 158 Mass. 240, 246; *Holbrook v. Young*, 108 Mass. 83; *Taylor v. Finnigan*, 189 Mass. 568. See also *International Trust Co. v. Schumann*, 158 Mass. 287; *Barnett v. Loud*, 226 Mass. 447; and *supra*, §§ 77, 144.

<sup>200</sup> *Bartlett v. Farrington*, 120 Mass. 284.

<sup>201</sup> *Taylor v. Kennedy*, 228 Mass. 390, 394.

<sup>202</sup> *Taylor v. Finnigan*, 189 Mass. 568. *Cp.* *Barnett v. Loud*, 226 Mass. 447.

<sup>203</sup> *Barnett v. Loud*, 226 Mass. 447.

## SECTION III

ACTION FOR USE AND OCCUPATION <sup>203</sup>

§ 255. Statutory provisions, pleading and practice.<sup>204</sup>—The action for use and occupation, as used in this book, covers all actions for compensation for the use of premises except those in which a sealed lease is declared upon. In general, it covers the actions formerly brought in *assumpsit*.<sup>205</sup> “According to the usage in this commonwealth, the word ‘rent’ applies as well to payments made by a tenant at will or at sufferance, as to those made by a tenant for years.”<sup>206</sup> The various statutory provisions, which we have previously considered in regard to the Action for Rent,<sup>207</sup> apply equally to the action for use and occupation so far as they may do so, and the reader is referred to the previous statement of them.

“In order to maintain *assumpsit* for the use and occupation of land, something in the nature of a demise must be shown, or some evidence given to establish the relation of landlord and tenant. That relation can only grow out of a contract, and it has accordingly been held that a contract express or implied is necessary in order to sustain *assumpsit* for use and occupation. The contract need not be technically formal but there must at least be a permissive occupation by the tenant. Occupation by the tenant with the assent of the landlord is indispensable to the maintenance of the action.”<sup>208</sup> “The action . . . does not depend on privity of estate, but on contract, express or implied, between the landlord and tenant, and occupation, actual or constructive, by the latter.”<sup>209</sup> Thus,

<sup>203</sup> For points not covered in this Section, see preceding Section as to Action for Rent; also Chapter I, *supra*.

<sup>204</sup> As to apportionment, see *supra*, §§ 222-225.

<sup>205</sup> See *supra*, §§ 226, 227.

<sup>206</sup> C. Allen, J., in *Rice v. Loomis*, 139 Mass. 303, in speaking of Pub. St., c. 121, §§ 4, 5.

<sup>207</sup> *Supra*, §§ 228-230.

<sup>208</sup> Ames, J., in *Central Mills v. Hart*, 124 Mass. 123. See *Codman v. Jenkins*, 14 Mass. 93, 95; *Boston v. Binney*, 11 Pick. 1; *Merrill v. Bullock*, 105 Mass. 486, 490; *Leonard v. Kingman*, 136 Mass. 123; *Kirchgassner v. Rodick*, 170 Mass. 543; *Stevenson v. Donnelly*, 221 Mass. 161, 165; *Jones v. Donnelly*, 221 Mass. 213, 216.

<sup>209</sup> Morton, J., in *Rogers v. Coy*, 164 Mass. 391; *Twichell v. McNabb*, 172 Mass. 329.

there may be a constructive possession after the tenant has in fact ceased to occupy the premises. If the tenant "actually holds, though he does not actually occupy or enjoy, the action may be maintained against him."<sup>210</sup>

Rent due under a parol lease may be recovered under a count for use and occupation,<sup>211</sup> or under a count upon an account annexed which contains an item therefor.<sup>212</sup> "Before the existence of the practice act the general count for use and occupation was proper for the recovery of rent due from a tenant occupying under a parol demise. But where there was a lease under seal it was necessary to declare either in debt or covenant upon the lease."<sup>213</sup> . . . The practice act abolishes the distinction between actions of assumpsit, covenant and debt, but requires the plaintiff to set forth the substantive facts necessary to constitute the cause of action. If a claim for rent under a parol demise is his cause of action it is well described by a count for use and occupation; but if the cause of action is a claim for rent upon a lease under seal, he must set forth the lease or the legal effect thereof with proper averments to describe the cause of action.<sup>214</sup> It is apparent, therefore, that if in an action for use and occupation he were to offer in evidence a tenancy under such lease,

<sup>210</sup> *Walker v. Furbush*, 11 Cush. 366, 368, per Metcalf, J. *Cp. McGlynn v. Brock*, 111 Mass. 219; *Whitney v. Gordon*, 1 Cush. 266.

Occupation how far necessary, see *supra*, §§ 152, 153, 155, and *infra* in this section.

<sup>211</sup> *Warren v. Ferdinand*, 9 Allen, 357; *Bowen v. Proprietors*, 137 Mass. 274; *Rogers v. Coy*, 164 Mass. 391; *George v. Putney*, 4 Cush. 351. *Cp. Codman v. Jenkins*, 14 Mass. 93; *Eaton v. Dugan*, 21 Pick. 538. See *supra*, § 227.

*Historical.* "Whether the St. 11 Geo. II, c. 19, giving an action of assumpsit for use and occupation is in force in this commonwealth, as statute law, we think it unnecessary to decide; the Court being of opinion, that by a long course of practice, which must now be considered as the common law of the State, that action may be maintained for rent not reserved by deed." Shaw, C. J., in *Gould v. Thompson*, 4 Met. 224, 227.

<sup>212</sup> *Bowen v. Proprietors*, 137 Mass. 274; *Brown v. Magorty*, 156 Mass. 209; *Taylor v. Dexter Engine Co.*, 146 Mass. 613; *Means v. Cotton*, 225 Mass. 313.

<sup>213</sup> 1 Chit. Pl. 117, 377; *Richards v. Killam*, 10 Mass. 243; *Codman v. Jenkins*, 14 Mass. 93.

<sup>214</sup> Gen. St., c. 129, § 2 [G. L., c. 231, § 7, cl. 11].



there would be a variance between his allegation and his proof and he could not recover. So if the defendant offers the lease in evidence, it is for the purpose of rebutting and disproving the plaintiff's case. It proves that there was no such tenancy as the plaintiff attempts to establish."<sup>215</sup>

So, the action for use and occupation is proper where by mutual consent a parol demise has been substituted for a sealed lease;<sup>216</sup> or where there is a written lease not under seal.<sup>217</sup> We have also seen above that the action for use and occupation is the proper action in which to recover for use and occupation by a tenant at sufferance.<sup>218</sup> And where property furnished to the tenant by a third person is left upon premises after the tenant has ceased to occupy them and after the landlord has notified the third person to remove the same, the third person is liable for storage in an action for use and occupation.<sup>219</sup>

Rent due under a sealed lease cannot be recovered under a count for use and occupation;<sup>220</sup> and the fact that the defendant was induced to sign a lease upon the faith of a collateral oral agreement that the terms of the lease should be changed, does not prevent the lease from presently taking effect or allow a recovery in this form of action.<sup>221</sup> On the other hand, where there is a good count for use and occupation, the fact that there is a second count on a lease to a third person does not make the declaration demurrable if it shows no written assignment of such lease to the defendant.<sup>222</sup>

The action for use and occupation will not lie on an implied promise to pay for the use of premises if there is an express

<sup>215</sup> Warren v. Ferdinand, 9 Allen, 357, per Chapman, J.

<sup>216</sup> Sibley v. Brown, 4 Pick. 137.

<sup>217</sup> Bowen v. Proprietors, 137 Mass. 274. See a discussion on this point *supra*, § 227.

<sup>218</sup> *Supra*, § 185.

<sup>219</sup> Taylor v. Dexter Engine Co., 146 Mass. 613. Of course the evidence might show an intention to abandon the property to the landlord. See also Grant v. Barnes, 177 Mass. 111.

<sup>220</sup> 1 Chitty Pl. 117, 377; Warren v. Ferdinand, 9 Allen, 357; Smiley v. McLauthlin, 138 Mass. 363; Codman v. Jenkins, 14 Mass. 93, 95, 98; Browning v. Haskell, 22 Pick. 310; Bowen v. Proprietors, 137 Mass. 274; Hunt v. Thompson, 2 Allen, 341, 343.

<sup>221</sup> Browning v. Haskell, 22 Pick. 310. *Cp.* Bogle v. Chase, 117 Mass. 273; Hall v. Ryder, 152 Mass. 528; O'Malley v. Grady, 222 Mass. 202.

<sup>222</sup> Sears v. Trowbridge, 15 Gray, 184.



promise or contract covering the matter;<sup>223</sup> and the fact that a lease to another party under whom a tenant occupies, is avoided for fraud, does not make the tenant liable for past use and occupation.<sup>224</sup>

Where a parol demise is shown, it is not necessary to prove any entry or actual occupation by the tenant, for the obligation to pay rent depends upon the contract;<sup>225</sup> but where the tenancy arises by implication, entry and occupation, either personally or by a servant, agent or under-tenant, must be proved.<sup>226</sup> A plea of tender and profert admits the tenant's occupation and the landlord's cause of action.<sup>227</sup>

The declaration should state the premises were occupied by virtue of a hiring by the defendant, or by permission of the plaintiff, but need not describe the premises in detail.<sup>228</sup> Whether a landlord can sue in tort for use and occupation, *quære*.<sup>229</sup>

The venue of the action is always transitory.<sup>230</sup>

§ 256. Evidence.—As to what is evidence of use and occupation, see also *supra*, §§ 152–157, and *infra*, § 264.

Where there was a dispute whether a defendant took a place under an oral agreement of certain lessees in respect to rent, it was held that the fact that the lessor had brought a suit against the lessees, which was still pending, was admissible evidence for the jury, subject to explanation.<sup>231</sup>

<sup>223</sup> Fuller v. Swett, 6 Allen, 219 n.; Brooks v. Allen, 146 Mass. 201; Boston v. Binney, 11 Pick. 1; Central Mills v. Hart, 124 Mass. 123, 125; Leonard v. Kingham, 136 Mass. 123; Mass. Gen. Hospital v. Fairbanks, 129 Mass. 78, 81; Earle v. Coburn, 130 Mass. 596. *Cp. supra*, § 186.

<sup>224</sup> Brooks v. Allen, 146 Mass. 201.

<sup>225</sup> 1 Taylor, Landl. & Ten., 9th ed., §§ 15, 624; Elliott v. Stone, 1 Gray, 571, 574; Ellis v. Paige, 1 Pick. 43; Hollis v. Pool, 3 Met. 350; Kelly v. Waite, 12 Met. 300; Fuller v. Swett, 6 Allen, 319 n.; Currier v. Jordan, 117 Mass. 260. See *supra*, §§ 152, 153, 155. G. L., c. 183, § 3; R. L., c. 127, § 3; Pub. St., c. 120, § 3, makes a parol lease create a tenancy at will *ipso facto*. See *supra*, § 18.

<sup>226</sup> 2 Taylor, Landl. & Ten., 9th ed., § 641.

<sup>227</sup> Currier v. Jordan, 117 Mass. 260.

<sup>228</sup> 2 Taylor, Landl. & Ten., 9th ed., § 651. *Cp. statutory form in Pub. St., v. 167, § 94.*

<sup>229</sup> See Allen v. Thayer, 17 Mass. 299, 302, where a landlord was not allowed to maintain trespass for use and occupation because he had been a disseisee during the period for which he claimed.

<sup>230</sup> 2 Taylor, Landl. & Ten., 9th ed., § 651.

<sup>231</sup> Bogle v. Chase, 117 Mass. 273.

In this action, the defendant cannot put in evidence the record of a judgment in a landlord and tenant process by a third person against the plaintiff, if no execution has issued thereon, and the defendant has received no notice and has not attorned to such third person, but has held under the plaintiff undisturbed until the end of the tenancy.<sup>232</sup> The court said as to this matter: "The judgment above did not *disseize* the plaintiff of the reversion. Indeed so far as appears, it may not have been rendered until after the defendant's term. As an adjudication of facts it was *res inter alios*. If it had not been *res inter alios*, it would not have shown that the plaintiff's title had terminated after the beginning of the defendant's tenancy at will. If the plaintiff's title did terminate, the defendant received no notice from the owner of the reversion, and did not attorn to him. The defendant held under the plaintiff undisturbed until the end of his tenancy and must pay him."<sup>233</sup>

§ 257. **Parties.**<sup>234</sup>—**Agents.**—Parol evidence is competent to show that an agreement for use and occupation, not under seal and signed by A, was in fact made by him on behalf of B, and that he was duly authorized to make it.<sup>235</sup>

§ 258. **Agreed vendees or lessees.**—One who enters under an agreement to purchase is not liable for use and occupation,<sup>236</sup> nor, on the other hand, is a vendor who remains in possession after the execution of a deed to the purchaser.<sup>237</sup> But the rule is otherwise in the case of one who enters under an agreement for a lease, on the theory that, unlike an agreement for a deed, the agreement for a lease contemplates a compensation for the use of the land.<sup>238</sup>

§ 259. **Boarders.**—A mere boarder is not liable for use and occupation.<sup>239</sup>

<sup>232</sup> *Eddy v. Coffin*, 149 Mass. 463. *Cp.* *Amory v. Kanonffsky*, 117 Mass. 351, cited *supra*, § 241.

<sup>233</sup> *Eddy v. Coffin*, 149 Mass. 463, 464, per Holmes, J.

<sup>234</sup> *Cp. supra*, §§ 231–238.

<sup>235</sup> *Bowen v. Proprietors*, 137 Mass. 274. But such evidence cannot be used to show title to real estate by written lease.

<sup>236</sup> *Supra*, § 157. *Little v. Pearson*, 7 Pick. 301. *Cp.* *Gould v. Thompson*, 4 Met. 224.

<sup>237</sup> *Boston v. Binney*, 11 Pick. 1.

<sup>238</sup> *Lyon v. Cunningham*, 136 Mass. 532; *Emmons v. Scudder*, 115 Mass. 367.

<sup>239</sup> *Theological Institute v. Barbour*, 4 Gray, 330. *Cp. as to lodgings, supra*, § 4.

§ 260. **Heirs.**—One who marries a widow, whose first husband died seized of the premises on which the widow and her second husband continue to reside, is not liable to an action for use and occupation by the children of the first marriage; he is deemed to have occupied by license of his wife.<sup>240</sup>

Similarly, the heirs-at-law of the owner of a tenement who in his lifetime had let it to his illegitimate son, cannot sustain an action for use and occupation thereof after the father's death, when such use and occupation have been continued by the son under a claim of right, and in the belief that he was legitimate.<sup>241</sup>

§ 261. **Joint parties**<sup>242</sup>.—"It is settled that one who is in as tenant in common, or by virtue of the right of a tenant in common, is not liable to another tenant in common for use and occupation though occupying the entire premises."<sup>243</sup> Of course, however, if there be an express agreement, the rule is otherwise, even though no amount is mentioned in the contract.<sup>244</sup>

One who, at his request, has been permitted by joint owners of real estate to enter into the use and occupation thereof, is liable to the survivors of the joint owners therefor, though he entered under a lease executed by only a portion of them.<sup>245</sup>

§ 261a. **Licensees.**—The action cannot be maintained against a mere licensee.<sup>246</sup>

§ 262. **Married women.**—If a married woman occupies premises of which her husband is tenant at will, with his assent, and under an agreement to pay the rent herself, she is liable for use and occupation, although living there with her husband;<sup>247</sup> and it is not necessary that the tenancy of the husband should terminate before that of the wife arises.

§ 263. **Sureties.**—Where a lease has been made to a principal and sureties, and the principal alone holds over, the

<sup>240</sup> *Kirchgassner v. Rodick*, 170 Mass. 543.

<sup>241</sup> *Flood v. Flood*, 1 Allen, 217.

<sup>242</sup> *Cp. supra*, § 234.

<sup>243</sup> *Kirchgassner v. Rodick*, 170 Mass. 543, 545, per Morton, J., citing *Badger v. Holmes*, 6 Gray, 118; *Carroll v. Carroll*, 188 Mass. 558.

<sup>244</sup> *Carroll v. Carroll*, 188 Mass. 558; *Kites v. Church*, 142 Mass. 586.

<sup>245</sup> *Codman v. Hall*, 9 Allen, 335.

<sup>246</sup> *Jones v. Donnelly*, 221 Mass. 213, 218.

<sup>247</sup> *Rogers v. Coy*, 164 Mass. 391; *Twichell v. McNabb*, 172 Mass. 329. See for a lease by a husband of his wife's estate under the old law, *Codman v. Jenkins*, 14 Mass. 93.

sureties are not liable for such use and occupation after the expiration of the term.<sup>248</sup>

§ 264. **Defenses.**<sup>249</sup>—**Enjoyment as creating liability.**—As in the case of rent, the law raises a promise to pay for use and occupation “only against a party who has the actual use and enjoyment of the estate;<sup>250</sup> but if the tenant once has the enjoyment of premises, the fact that he chooses to leave them and makes no further use of them, is no defence to an action for use and occupation.<sup>251</sup> If the tenant wishes to relieve himself from liability he must take proper steps to terminate the tenancy. So, if one has the full right to enjoy premises, the fact that he uses them for a less valuable purpose does not prevent his being liable for the full value. Thus, if one occupies premises suitable for manufacturing purposes and equipped with water power, he is liable in an action for use and occupation for the fair rental value of the premises for such purposes, though he uses them only for storage of goods.<sup>252</sup> “To make the sum for which the defendant is liable depend upon the value of the occupation to him would be unjust to the plaintiff, who is entitled to a fair rental for all the premises of which the defendant’s occupation necessarily deprived him.”<sup>253</sup>

“In order to maintain assumpsit for the use and occupation of land, something in a nature of a demise must be shown, or some evidence given to establish the relation of landlord and tenant. That relation can only grow out of a contract, and it has accordingly been held that a contract express or implied is necessary in order to sustain assumpsit for use and occupation. The contract need not be technically formal, but there must at least be a permissive occupation by the tenant. Occupation by the tenant with the assent of the landlord is indispensable to the maintenance of the action.”<sup>254</sup>

<sup>248</sup> *Brewer v. Knapp*, 1 Pick. 332. *Cp. supra*, § 237.

<sup>249</sup> See also *supra*, §§ 242–253; also the various covenants and titles.

<sup>250</sup> *Theological Institute v. Barbour*, 4 Gray, 329, Shaw, C. J. As to what constitutes use and enjoyment, see *supra*, §§ 152, 255.

<sup>251</sup> *Walker v. Furbush*, 11 Cush. 366. *Cp. Whitney v. Gordon*, 1 Cush. 266.

<sup>252</sup> *Horton v. Cooley*, 135 Mass. 589. *Cp. Taylor v. Dexter Engine Co.*, 146 Mass. 613.

<sup>253</sup> *Horton v. Cooley*, 135 Mass. 589, per Devens, J.

<sup>254</sup> Ames, J., in *Central Mills v. Hart*, 124 Mass. 123. See also *Codman v.*

Therefore, where one holds under a title adverse to the plaintiff, the action for use and occupation will not lie.<sup>255</sup> "An action for use and occupation requires proof of some agreement, express or implied, to pay for the beneficial enjoyment of the premises. It cannot be supported where there has been only an occupation founded on a title which is adverse to and inconsistent with the right claimed by the plaintiff. Nor can it be made use of to try the title to property between two litigating parties. The fact that the title is in dispute, and that the defendant has occupied the road, denying the right of the plaintiff and as tenant of a third person, if proved, would constitute a good defence to this action, because it would show that there was no agreement, either express or implied by law, on which an action of contract could be maintained."<sup>256</sup>

Where the heirs of a deceased intestate agreed that one of them should be appointed administratrix and manage and receive the rents of the real estate, and she received from a tenant rents accruing before and after the death of the intestate, but made no contract with him as administratrix or otherwise, she cannot as administratrix bring an action against him for subsequent use and occupation.<sup>257</sup> In another case,<sup>258</sup> a tenant at will of the mortgagor was notified by a purchaser of the equity of redemption, that he owned the premises and the tenant agreed to hold possession for and to pay rent to the purchaser. Subsequently, the mortgagee entered for condition broken and notified the tenant to pay rent to him. The tenant made no reply to the notice, continued to occupy the premises and paid rent to the purchaser of the equity after the entry. There was no evidence that the purchaser

Jenkins, 14 Mass. 93, 95; *Boston v. Binney*, 11 Pick. 1; *Merrill v. Bullock*, 105 Mass. 486, 490; *Leonard v. Kingman*, 136 Mass. 123; *Rogers v. Coy*, 164 Mass. 391; *Kirchgassner v. Rodick*, 170 Mass. 543; *Allen v. Thayer*, 17 Mass. 299.

<sup>255</sup> *Fletcher v. McFarlane*, 12 Mass. 43; *Allen v. Thayer*, 17 Mass. 299; *Kittredge v. Peaslee*, 3 Allen, 235; *Merrill v. Bullock*, 105 Mass. 486, 490; *Cobb v. Arnold*, 8 Met. 398; *Patch v. Loring*, 17 Pick. 336; *Mayo v. Shattuck*, 14 Pick. 533. *Cp.* *Boston v. Binney*, 11 Pick. 1, and *supra*, § 120.

<sup>256</sup> Bigelow, C. J., in *Kittredge v. Peaslee*, 3 Allen, 235, 237, citing *Allen v. Thayer*, 17 Mass. 301; *Mayo v. Fletcher*, 14 Pick. 525; *Patch v. Loring*, 17 Pick. 336; *Boston v. Binney*, 11 Pick. 1.

<sup>257</sup> *Cummings v. Watson*, 149 Mass. 262.

<sup>258</sup> *Lucier v. Marsales*, 133 Mass. 454.

claimed adversely to the mortgagee, or that, in paying rent to the purchaser, the tenant asserted any right adverse to the mortgagee. It was held that these facts did not show that the tenant occupied adversely to the mortgagee. "Where a tenant holds over, and there is no evidence of any new or different stipulation, the implication is warranted that the continued use and occupation are on the same terms as those on which the premises were originally demised."<sup>259</sup>

§ 265. *Agency*.—In an action for use and occupation against A and B, it appeared that A took no part in the hiring except that he was present when B made the agreement with the plaintiff; that B hired the premises for the purpose of carrying on business there under the name of A; that the plaintiff made out his bills for rent to B; and that the plaintiff afterwards proved the claim which was the subject of the action against the estate of A in insolvency. The judge ruled that there was no evidence that A had made a contract with the plaintiff; instructed the jury that if A was the agent of B the plaintiff could not recover against B; and refuse to rule that if B was doing business under the name of A, and the premises were hired in furtherance of said business, the plaintiff could not recover. It was held the jury might find B liable and that the instructions were correct.<sup>260</sup>

§ 266. *Arbitration*.—An award under an agreement for arbitration has the effect of discharging previous agreements, but is not itself a bar to an action for use and occupation. In one case, the court expressed this principle thus: "In the present case the plaintiff claims to recover on a count on a special agreement, and also for use and occupation. To this the defendants answer that the plaintiff's remedy is by an action for non-performance of the award of the arbitrators. But the court are of opinion, that on the facts proved, this constitutes no valid answer to the claim of the plaintiff for use and occupation of the premises. The effect of the submission and award was to supersede all previous agreements, leases and dealings between the parties respecting the estate in question."<sup>261</sup>

Where the defendant bound himself under a penalty to convey land to the plaintiffs at such figure as arbitrators should

<sup>259</sup> Bigelow, C. J., in *Dimock v. Van Bergen*, 12 Allen, 551; *Brewer v. Knapp*, 1 Pick. 332. *Cp.* *Jaques v. Gould*, 4 Cush. 384.

<sup>260</sup> *Gardner v. Peaslee*, 143 Mass. 382.

<sup>261</sup> *Knowles v. Shapleigh*, 8 Cush. 333.

award, and agreed to become a tenant to the plaintiffs until August 1, at such rent as the arbitrators should decide upon, and later refused to convey the land, tendered the penalty, and consented about Aug. 1 that the tenants in possession should remain, on condition of paying him rent as heretofore, it was held the defendant was not liable to the plaintiffs for use and occupation after August 1.<sup>262</sup> "It is said that a party injured may waive the tort and maintain assumpsit. But the defendant has a right to say to the plaintiffs 'there has been no tort; you have nothing to waive; the land is mine not yours.' And whether it belongs to one or the other, we could not try in an action of assumpsit for use and occupation." <sup>263</sup>

§ 267. Eviction.—As to when eviction is a defence to this action see *supra*, §§ 142, 143 and 245.

In a case where a landlord retained the key of a locked room in the demised house and refused to give it to the tenant, it was held that he could not recover for use and occupation on the express contract, through failure to furnish the stipulated consideration, nor on an implied contract because the failure was wilful.<sup>264</sup>

§ 268. Former recovery.—Former recovery may be pleaded as a defence to this action.<sup>265</sup>

§ 269. Fraud.—The fact that an agreement for use and occupation was induced by false representations is no defence to this action, but is only matter of damages to be deducted from the sum due, provided the defendant has not rescinded or attempted to rescind the contract.<sup>266</sup>

§ 270. Illegality.—An agreement for the use and occupation of land, made on the Lord's day, is void; but if the land is subsequently entered upon and occupied, the action for use and occupation will lie.<sup>267</sup> Where the evidence discloses that the

<sup>262</sup> *Boston v. Binney*, 11 Pick. 1.

<sup>263</sup> *Boston v. Binney*, 11 Pick. 1, 9, per Putnam, J.

<sup>264</sup> *Moore v. Mansfield*, 182 Mass. 302.

<sup>265</sup> *Warren v. Comings*, 6 Cush. 103.

<sup>266</sup> *Hall v. Ryder*, 152 Mass. 528. *Cp.* *Milliken v. Thorndike*, 103 Mass. 382; *Browning v. Haskell*, 22 Pick. 310; *O'Malley v. Grady*, 222 Mass. 202.

<sup>267</sup> G. L., c. 136; R. L., c. 98; St. 1887, c. 391, §§ 3, 4; St. 1895, c. 434, § 5; Pub. St., c. 98; Gen. St., c. 84; Rev. St., c. 50. *Stebbins v. Peck*, 8 Gray, 553; *Day v. Mc Allister*, 15 Gray, 433; *Cranson v. Goss*, 107 Mass. 439; *O'Brien v. Shea*, 208 Mass. 528. See also *supra*, §§ 34, 128-132.

Query, whether, where a Sunday contract has been adopted by the



contract of hiring was made on Sunday, but the point does not appear in the pleadings and is not raised by the defendant, it seems that the judge has discretion whether to raise it, and his failure to do so gives no ground for exception.<sup>268</sup>

"This case is not affected by the Rev. Sts. c. 50, forbidding unnecessary labor on the Lord's day; for the defendant entered on the land subsequently to the Lord's day, on which the contract was made, and by such subsequent entry and continued occupation created a new liability if no legal contract existed previously. It was either a ratification of a previously inoperative contract, or was the foundation of a new implied provision to pay for the use of the land what the same was reasonably worth." <sup>269</sup> Hoar, J., in *Day v. McAllister*, commenting upon this case says, "the word 'ratification' is used it is true, but it is in connection with the word 'adoption' and was not intended, as the context shows, to give any countenance to the idea that the contract could be made valid *ab initio* by any subsequent agreement between the parties." <sup>270</sup>

§ 270a. *Ultra vires*.<sup>271</sup>—Where a contract of letting is *ultra vires* the mayor and council of a city, no action can be maintained either upon the lease or on an implied contract for use and occupation.<sup>272</sup>

§ 271. *Recoupment*.—In this action, the tenant cannot recoup the expense of moving from the premises during his tenancy because of an alleged breach of the landlord's agreement, if he would have been put to the same expense at the end of his tenancy.<sup>273</sup>

## SECTION IV

### ACTION ON THE COVENANTS

§ 272. *In general*.<sup>274</sup>—Where there is a written lease under seal, the tenant is entitled to sue in contract for a breach of parties on a later day, the plaintiff can recover the amount stipulated for on Sunday or the fair value of the defendant's occupation. *O'Brien v. Shea*, 208 Mass. 528, 532; *Cranston v. Goss*, 107 Mass. 439, 442.

<sup>268</sup> *O'Brien v. Shea*, 208 Mass. 528.

<sup>269</sup> *Stebbins v. Peck*, 8 Gray, 553, per Dewey, J.

<sup>270</sup> 15 Gray, 433, 435.

<sup>271</sup> See *Municipal Corporations*, *supra*, § 30a.

<sup>272</sup> *Commercial Wharf Co. v. Boston*, 208 Mass. 482.

<sup>273</sup> *Eddy v. Coffin*, 149 Mass. 463. *Cp. supra*, § 254.

<sup>274</sup> For the action on the covenant to pay rent, see *supra*, §§ 59-64, 228-254. For actions upon other covenants, see separate titles *supra*, §§ 65-111.



the covenants contained therein by the landlord, and, as we have seen, the tenant if sued for his rent may recoup damages for such breach. He is not obliged to do so, however, but may maintain a separate action for the breach of covenant.<sup>275</sup> The breach of a purely collateral agreement, cannot, however, be used as a defence, but must be made the basis of a separate or cross action.<sup>276</sup>

The action may, it seems, be maintained, by the survivors of several lessors against a lessee who has entered and enjoyed the premises, although the lease was executed by only a portion of the lessors.<sup>277</sup> "When covenants are made by and between two or more parties, although the covenant may be for the benefit of a third person mentioned in the instrument, the action must nevertheless be brought by one of the parties."<sup>278</sup>

A waiver of one breach of covenant is not a defence to an action for another and distinct breach of the same covenant.<sup>279</sup>

Illegal use of the premises unknown to the lessor will not excuse the lessee from his obligation on the covenants.<sup>280</sup> As to other defences, see the various covenants *supra*, and in actions for rent, *supra*, §§ 242-254. For relief in equity, see also *infra*, §§ 281-291.

§ 273. By and against assignees.—The assignee of a lease is liable upon all covenants which run with the land during the time he holds, through privity of estate,<sup>281</sup> but the original lessee is also liable upon the express covenants by privity of contract.<sup>282</sup> In the case of a sublease, the lessee and not the

For actions by and against assignees, see *supra*, §§ 47-54. As to what covenants run with the land, see *supra*, § 55.

<sup>275</sup> *Riley v. Hale*, 158 Mass. 240, 246; *International Trust Co. v. Schumann*, 158 Mass. 287. See also *supra*, §§ 77, 144.

<sup>276</sup> *Supra*, § 41a.

<sup>277</sup> *Codman v. Hall*, 9 Allen, 335. *Cp.* *Ripley v. Cross*, 111 Mass. 41.

<sup>278</sup> *Montague v. Smith*, 13 Mass. 396, 405, per Parker, C. J. The rule is the same in regard to simple contracts. It is true that in *Brewer v. Dyer*, 7 Cush. 337, an action of assumpsit was allowed against one who had promised a lessee to take his sealed lease off his hands. But this decision was afterwards criticised and limited in *Exchange Bank v. Rice*, 107 Mass. 37, 41, 43, in which numerous cases are cited in support of the general rule.

<sup>279</sup> *Seaver v. Coburn*, 10 Cush. 324.

<sup>280</sup> *Way v. Reed*, 6 Allen, 364, 370. See *supra*, § 129.

<sup>281</sup> § 47. As to what covenants run with the land, see § 55.

<sup>282</sup> § 50.

sublessee is the one who is liable for breach of the covenants in the lease.<sup>283</sup>

On the other hand, the assignee of the lessor is entitled to sue the lessee or his assignee upon the covenants of the lease in his own name,<sup>284</sup> but in the case of a sublease the remedy of the lessor or his assignee is against the lessee and not against the sublessee.<sup>285</sup> An assignee of the reversion is entitled to recover only rent due after the assignment,<sup>286</sup> and cannot recover previously accruing rent in his own name although it be specially granted to him. Where there has been an assignment either by the lessor or the lessee, an action by or against the assignee on the covenants must be brought in the county where the land lies, being local and not transitory because it is founded on privity of estate and not privity of contract.<sup>287</sup>

## SECTION V

### WASTE AND TORT IN THE NATURE OF WASTE

§ 274. **In general.**<sup>288</sup>—The usual remedy of the landlord for waste on the part of the tenant is an action of tort; but this

<sup>283</sup> § 52.

<sup>284</sup> § 54. *Cp.* G. L., c. 231, § 5.

<sup>285</sup> § 52.

<sup>286</sup> § 54.

<sup>287</sup> *Clark v. Scudder*, 6 Gray, 122; *Patten v. Deshon*, 1 Gray, 325; *Lienow v. Ellis*, 6 Mass. 331 (case of deed).

<sup>288</sup> *Cp.* Covenant against Waste, *supra*, § 109, and Waste, *supra*, §§ 202–204; Termination of Tenancy at Will, *supra*, § 178; Equity, *infra*, § 291.

*Historical.* At common law the action of waste lay only against tenants in dower and by curtesy and guardians in chivalry, not against tenants for life or for years; and it could be brought only by the immediate reversioner and not by an assignee. The right of action was extended to tenants for years by the statute of Gloucester, 6 Edw. I, c. 5. 2 Wood, *Landl. and Ten.*, 2d ed., 991; 2 Taylor, *Landl. and Ten.*, 9th ed., § 686. Whether this act covered both voluntary and permissive waste, *quære*. See *Harnett v. Maitland*, 16 M. & W. 262; *Co. Lit.* 57 *a*; *Pomfret v. Ricroft*, 1 Saund. 323 *b*. The statute is cited in *Padelford v. Padelford*, 7 Pick. 154; *Sackett v. Sackett*, 8 Pick. 309; *Attaquin v. Fish*, 5 Met. 147; *Lothrop v. Thayer*, 138 Mass. 472. It was held to have been adopted as part of the law of this state in *Sackett v. Sackett*, 8 Pick. 309; *Carver v. Miller*, 4 Mass. 558, 563, per Parsons, C. J. See 4 Kent, 81. As to the earlier statute of Marlebridge, 52 Hen. III, c. 23, see *Sackett v. Sackett*, 8 Pick. 309; *Lothrop v. Thayer*, 138 Mass. 472; *Dane Abr. Waste*.

does not exclude an action of contract on an express covenant,<sup>289</sup> or an action of contract on an implied covenant to use the premises in a tenant-like manner.<sup>290</sup> The remedy, however, if any, for an injury to the reversion, caused by a lawful removal of fixtures, is not on the express covenant against waste.<sup>291</sup>

A tenant at will is liable to an action of tort for voluntary waste,<sup>292</sup> but not for merely premissive waste.<sup>293</sup> Where a tenant at sufferance refused to leave premises and the landlord entered, it was held, under the former system of pleading, that he could maintain an action of trespass *quare clausum fregit* against the tenant for any injury to the soil.<sup>294</sup>

We have seen that a tenant is liable for waste committed by a stranger,<sup>295</sup> and where there are several joint tenants, or tenants in common, they are all liable for the waste of any one.<sup>296</sup> One or more owners in common of land wasted may sue for his or their damages or they may join in an action.<sup>297</sup>

Where a tenant for years demised to the remainder-man reserving a right to erect buildings, the lessee agreeing to pay rent and taxes and to repair fences, it was held that owing to the merger of the term no action could be maintained for waste committed by the tenant for years.<sup>298</sup>

§ 275. Action of waste.—If a tenant for years “commits or suffers waste on the land so held, the person having the next immediate estate of inheritance may have an action of waste

<sup>289</sup> *Brown v. Magorty*, 156 Mass. 209; *Wall v. Hinds*, 4 Gray, 256, 270. *Cp. Essex Lunch, Inc. v. Boston Lunch Co.*, 229 Mass. 557, 559.

<sup>290</sup> *Supra*, § 204.

<sup>291</sup> *Wall v. Hinds*, 4 Gray, 256, 271.

<sup>292</sup> *Chalmers v. Smith*, 152 Mass. 561; *Lothrop v. Thayer*, 138 Mass. 465, 473; *Daniels v. Pond*, 21 Pick. 367; *Starr v. Jackson*, 11 Mass. 519; *Lienow v. Ritchie*, 8 Pick. 235; *United States v. Bostwick*, 94 U. S. 53, 66.

<sup>293</sup> *Co. Lit.* 57 *a*, *note*; 4 Kent Com. 81; *Daniels v. Pond*, 21 Pick. 367; *Lothrop v. Thayer*, 138 Mass. 466, 474; *Harnett v. Maitland*, 16 M. & W. 256.

<sup>294</sup> *Dorrell v. Johnson*, 17 Pick. 263.

<sup>295</sup> *Supra*, § 202.

<sup>296</sup> *Green v. Cole*, 2 Wms. Saund. 259, *b*.

<sup>297</sup> *G. L.*, c. 231, § 3. Formerly they had to bring separate actions because their estates are several. *Bullock v. Hayward*, 10 Allen, 460; *Daniels v. Daniels*, 7 Mass. 137; *May v. Parker*, 12 Pick. 38, 39. And such was the common law rule as to all real actions, but it was changed as to writs of entry by statute. *G. L.*, c. 237, § 8.

<sup>298</sup> *Pynchon v. Stearns*, 11 Met. 304.

against such tenant to recover the place wasted and the amount of the damage, and such action shall be subject to the provisions of law relative to trial by jury. An heir may bring such action for waste done in the life time of his ancestor.”<sup>299</sup>

§ 276. Tort in the nature of waste.—“A person having the next immediate estate of inheritance, or a remainder or reversion in fee simple or fee tail after an intervening life estate, or having a remainder or reversion for life or for years, may have an action of tort in the nature of waste to recover the amount of the damage against the tenants named in the preceding section.”<sup>300</sup>

One or more owners in common of the land wasted may sue for his or their damages or may join in one action.<sup>301</sup> The right to commence such an action passes to the assignee in insolvency of the owner.<sup>302</sup>

“If such action in tort was commenced in the lifetime of the tenant, it may be prosecuted against his executor or administrator or it may be commenced against such executor or administrator for waste committed or suffered in the tenant’s lifetime.”<sup>303</sup>

<sup>299</sup> G. L., c. 242, § 1; R. L., c. 185, § 1; Pub. St., c. 179, § 1; Gen. St., c. 138, §§ 1, 2; Rev. St., c. 105, §§ 1, 2. Cited in *Wilbur v. Wilbur*, 7 Met. 251; *Attaquin v. Fish*, 5 Met. 149; *Morgan v. Larned*, 10 Met. 50; *Lothrop v. Thayer*, 138 Mass. 473; *Chalmers v. Smith*, 152 Mass. 561.

*Historical.* Under St. 1841, c. 55, the Supreme Judicial Court had exclusive jurisdiction of actions of waste and in the nature of waste. This applied to technical waste only and not to mere trespasses. *Wilbur v. Wilbur*, 7 Met. 249; *Attaquin v. Fish*, 5 Met. 149.

As to the law before this statute, see *Sackett v. Sackett*, 5 Pick. 192; *Padelford v. Padelford*, 7 Pick. 152; *Sackett v. Sackett*, 8 Pick. 309.

As to the action for treble damages under St. 1795, c. 75, § 3, see *Reed v. Davis*, 8 Pick. 514.

<sup>300</sup> G. L., c. 242, § 2; R. L., c. 185, § 2; Pub. St., c. 179, §§ 3, 4; Gen. St., c. 138, §§ 4, 5; Rev. St., c. 105, §§ 4, 5; St. 1852, c. 312. Cited in *Bullock v. Hayward*, 10 Allen, 461; *Lothrop v. Thayer*, 138 Mass. 473. Cp. *Fay v. Brewer*, 3 Pick. 203.

<sup>301</sup> G. L., c. 231, § 3. Formerly, all the owners had to join in the action of tort, as it was a personal action and the damages belonged to all jointly. *Bullock v. Hayward*, 10 Allen, 460; *Daniels v. Daniels*, 7 Mass. 137; *May v. Parker*, 12 Pick. 38, 39.

<sup>302</sup> *Bullock v. Hayward*, 10 Allen, 461; *Gray v. Bennett*, 3 Met. 525, 531. Cp. G. L., c. 216, §§ 54, 59.

<sup>303</sup> G. L., c. 242 § 3; R. L., c. 185, § 3; Pub. St., c. 179, § 5; Gen. St., c. 138, § 6; Rev. St., c. 105, § 6; St. 1852, c. 312.

"If, during the pendency of an action for the recovery of land, the tenant or person in possession, with knowledge thereof, commits waste, the demandant, if he recovers judgment, may afterward recover in tort three times the amount of the damages assessed therefor."<sup>304</sup> Such damages can only be recovered in an action at law, and cannot be an item of charge as between the mortgagor and mortgagee on a bill to redeem.<sup>305</sup>

Of another section of the same chapter, also giving treble damages, the court said: "The treble damages given by the statute need not be specially claimed in the declaration; and the court might lawfully direct the jury, upon being satisfied of the facts necessary to constitute the cause of action for which the plaintiff was entitled to recover special damages, either to assess single damages for such cause of action leaving it to the court to treble them, or, after estimating single damages therefor, to treble them themselves."<sup>306</sup>

In addition to the remedy in tort for waste, there may also be an action of contract upon the implied agreement of the tenant to use the premises in a tenant-like manner. An acceptance of rent for the full term of the tenancy is not necessarily a waiver of the right to recover damages for the breach of such contract. It is "merely evidence for the consideration of the jury upon the question whether there was a waiver. A liability in damages for an act of this kind may well be enforced in an action of contract, notwithstanding that the rent has been fully paid."<sup>307</sup>

It is doubtful whether the statute of limitations runs against an action of waste.<sup>308</sup>

Whether a discharge in bankruptcy would bar an action of tort for waste, *quære*. It has been held not to bar an action of tort where the gist of the action is trespass *quare clausum*

<sup>304</sup> G. L., c. 242, § 6; R. L., c. 185, § 6; Pub. St., c. 179, § 8; Gen. St., c. 138, § 9; Rev. St., c. 105, § 9; St. 1852, c. 312; St. 1795, c. 75, § 3. Cited in *Boston Iron Co. v. King*, 2 Cush. 405.

<sup>305</sup> *Boston Iron Co. v. King*, 2 Cush. 400, 405.

<sup>306</sup> *Snelling v. Garfield*, 114 Mass. 443, 445, per Gray, C. J. *Cp.* *Clark v. Worthington*, 12 Pick. 571; *Worster v. Canal Bridge*, 16 Pick. 541, 549; *Pressey v. Wirth*, 3 Allen, 191.

<sup>307</sup> Per Knowlton, J., in *Chalmers v. Smith*, 152 Mass. 561. See further, *supra*, §§ 202, 204.

<sup>308</sup> See *Padelford v. Padelford*, 7 Pick. 152. On ordinary actions of tort the limitation is six years. G. L., c. 260, § 2. *Cp.* G. L., c. 231, § 1.

*fregit*, although the chief damage be the stripping of the soil.<sup>309</sup>

At common law, the action did not survive and did not lie against an executor of the tenant except for waste committed by the executor;<sup>310</sup> but by statute "In addition to the actions which survive by the common law, the following shall survive; . . . actions of tort . . . for damage to real or personal property."<sup>311</sup>

As to the recovery of damages for waste in a real action, see *infra*, § 296, and as to the remedy in equity, see *infra*, § 291.

## SECTION VI

### REMEDY IN TORT

§ 277. In general.<sup>312</sup>—The present action of tort includes, as far as the law of landlord and tenant is concerned, the actions formerly known as trespass *quare clausum fregit*, trespass on the case, trespass *de bonis asportatis*, and trover.<sup>313</sup> Of these, the first two lay for injury to realty, and the last two for the carrying away and conversion of personal property. There was also the action of trespass *vi et armis* which lay, for example, in case of a personal assault during an unauthorized entry. Trespass was distinguished from the action on the case in that it could be brought only by one entitled to the present possession, for immediate injuries committed by force,<sup>314</sup> while case lay to recover damages "for torts not committed with force, actual or implied; or, having been occasioned by force, where the matter affected was not tangible or the injury was not immediate, but consequential; or, where the interest in the property was only in reversion; in all which cases trespass was not sustainable."<sup>315</sup>

<sup>309</sup> *Hapgood v. Blood*, 11 Gray, 400. *Cp. Eames v. Prentice*, 8 Cush. 337.

<sup>310</sup> 2 Taylor, Landl. & Ten., 9th ed., § 689.

<sup>311</sup> G. L., c. 228, § 1; R. L., c. 171, § 1; Pub. St., c. 165, § 1; Gen. St., c. 127, § 1; Rev. St., c. 93, § 7; St. 1828, c. 112 (real estate); St. 1834, c. 2 (personal estate).

<sup>312</sup> *Cp. Rights against Third Parties, infra*, §§ 351, 355, 356.

<sup>313</sup> Trover, like assumpsit, was strictly an action on the case.

<sup>314</sup> 1 Chitty, Plead. 186; *French v. Fuller*, 23 Pick. 104.

<sup>315</sup> *Ibid*; *Lienow v. Ritchie*, 8 Pick. 235.

§ 278. *Trespass quare clausum and case.*—For any unlawful entry upon him by the landlord, the tenant may have an action of tort in the nature of trespass *quare clausum fregit*.<sup>316</sup> But, as we have seen, he cannot maintain the action until entry into possession of the estate, as the action presupposes possession.<sup>317</sup> Nor can he recoup damages due to trespasses committed by the landlord in an action brought by the latter for rent, inasmuch as the causes of action are different.<sup>318</sup>

So, a tenant at will can maintain trespass against his landlord who enters and removes property belonging to the estate;<sup>319</sup> but not because the latter leases the premises and advises the lessee to eject the tenant.<sup>320</sup>

We have already seen that a tenant at sufferance has no action for the lawful and peaceable entry upon him of the landlord after due notice; but that he has an action for an assault committed upon him during such entry.<sup>321</sup>

In case of an eviction of the tenant by the entry either of the landlord or of one having a title paramount, the tenant may maintain trespass against the landlord, although he may have an alternative remedy on the covenant for quiet enjoyment.<sup>322</sup> Where a lessor deprives a lessee of water-power which is demised to him under the lease the lessee may maintain an action of tort therefor, even though part of the time the water was shut off to repair a dam. The lessee may recover what loss he has sustained in his business, and to prove the use to which the premises were applied, and the nature

<sup>316</sup> *Warner v. Abbey*, 112 Mass. 355; *Payne v. Davis*, 128 Mass. 383; *Dickinson v. Goodspeed*, 8 Cush. 119; *Faxon v. Jones*, 176 Mass. 138. See *Mason v. Holt*, 1 Allen, 45; *Nelson Theatre Co. v. Nelson*, 216 Mass. 30, 34.

<sup>317</sup> *Supra*, § 16.

<sup>318</sup> *Bartlett v. Farrington*, 120 Mass. 284. See *supra*, § 254.

<sup>319</sup> *Dickinson v. Goodspeed*, 8 Cush. 119 (removal of pump).

<sup>320</sup> Evidence of the lessee's motives in ejecting the tenant is not material. *Groustra v. Bourges*, 141 Mass. 7.

<sup>321</sup> *Supra*, § 181.

<sup>322</sup> *Fillebrown v. Hoar*, 124 Mass. 580; *Hilbourn v. Fogg*, 99 Mass. 11.

In case of an eviction the tenant may sue on the covenant for quiet enjoyment, or he may elect to treat the eviction by the landlord as an unlawful invasion of his rights and sue in tort. *Mitsakos v. Morrill*, 237 Mass. 29.

As to the measure of damages, see *supra*, § 144.



and extent of the business carried on there, he may show orders contained in letters.<sup>323</sup>

So, if the landlord deprives the tenant of free ingress and egress to take away his crops when ripe, he is liable to an action of tort in the nature of an action on the case.<sup>324</sup> But, if the relation of tenancy in common exists between the landlord and the tenant under an agreement as to sharing of crops, trespass will not lie by one against the other.<sup>325</sup>

Where a landlord has obtained the taking of a lease by fraudulent representations as to a material matter, and the contract is not rescinded, the tenant may have an action against the landlord for the deceit, or if sued for rent, he may recoup his damages.<sup>326</sup>

The landlord may have an action of tort against tenants or subtenants during the term, whenever his reversionary interest is endangered by their acts. In other words, his right to sue for such injury during the term is the same whether the injury is committed by a tenant or a third person, and is confined to cases of injury to the reversion.<sup>327</sup>

Therefore, the landlord may maintain an action of tort where the tenant commits waste,<sup>328</sup> although the tenant may be also liable in contract under his implied or express covenant not to spoil the premises. The action lies against the tenant for acts committed by a stranger, but a tenant at will is not liable to the action for merely permissive waste.<sup>329</sup> The right of action may be waived by the acceptance of rent, but is not necessarily waived by such acceptance.<sup>330</sup> The tenant is liable for wanton injury in the removal of fixtures; and perhaps for unavoidable injury.<sup>331</sup> An action on the case was held to be the appropriate remedy where lessees of a water privilege took more water than they were allowed to by the terms of the lease.<sup>332</sup>

<sup>323</sup> *Bartlett v. Greenleaf*, 11 Gray, 98.

<sup>324</sup> *Supra*, § 209.

<sup>325</sup> *Supra*, § 211.

<sup>326</sup> See *supra*, §§ 35, 192, 197, 271.

<sup>327</sup> 1 Taylor, Landl. & Ten., 9th ed., § 173. See *infra*, §§ 355, 356.

<sup>328</sup> *Supra*, §§ 178, 204, 276.

<sup>329</sup> *Supra*, § 202.

<sup>330</sup> *Chalmers v. Smith*, 152 Mass. 561. See *supra*, § 202.

<sup>331</sup> See *supra*, § 221.

<sup>332</sup> *Bigelow v. Battle*, 15 Mass. 313.



Tenants at sufferance are not liable to an action of tort in the nature of trespass *quare clausum fregit* before an entry by the landlord, but they are liable after such entry.<sup>333</sup>

§ 279. Trespass de bonis and trover.—If a landlord unlawfully removes property of his tenant, the latter is entitled to an action of tort in the nature of trespass *de bonis asportatis* or trover.<sup>334</sup> Similarly, if the landlord forcibly prevents a tenant from removing his personal chattels during the tenancy, and refuses a demand of the tenant for leave to remove them, and claims them as his, he is liable to an action of tort for their conversion.<sup>335</sup> But no action for conversion lies for preventing the removal of fixtures, so long as they are annexed to the realty; for they are not personal property until they are severed.<sup>336</sup> On the other hand, if the lessee agree to return certain property of the lessor, or its equivalent, at the end of the lease, the lessor may maintain trover against a purchaser of the property.<sup>337</sup>

Trespass will not lie for a share of crops where the relation of tenants in common exists between the landlord and the tenant; and trover will lie only “where there is such destruction, sale or disposition of the crops by the one that the other party is precluded by that act from any further enjoyment of it.”<sup>338</sup>

§ 280. Survival and limitation of actions.—“In addition to the actions which survive by the common law, the following shall survive: actions of . . . tort for . . . damage to real or personal property.”<sup>339</sup> This provision “was intended to include only those cases where injury is occasioned to property by the direct wrongful act of a party, and not where it

<sup>333</sup> *Supra*, § 183.

<sup>334</sup> *Warner v. Abbey*, 112 Mass. 355; *Payne v. Davis*, 128 Mass. 383; *Billings v. Tucker*, 6 Gray, 368; *Lash v. Ames*, 171 Mass. 487. Whether insufficiency of time in a notice to quit can be pleaded by the landlord who has given the notice in an action by the tenant against him, *quare*. *Lash v. Ames*, 171 Mass. 487.

<sup>335</sup> *Guthrie v. Jones*, 108 Mass. 191; *Korbe v. Barbour*, 130 Mass. 255.

<sup>336</sup> *Supra*, § 221.

<sup>337</sup> *Billings v. Tucker*, 6 Gray, 368, cited *supra*, § 211.

<sup>338</sup> *Supra*, § 211.

<sup>339</sup> G. L., c. 228, § 1; R. L., c. 171, § 1; Pub. St., c. 165, § 1; Gen. St., c. 127, § 1; Rev. St., c. 93, § 7; St. 1828, c. 112 (real property); St. 1834, c. 2 (personal property); *Cutter v. Hamlen*, 147 Mass. 471; *Lufkin v. Cutting*, 225 Mass. 607.

results incidentally or collaterally therefrom, or from the doing of some other act, or the happening of some subsequent event over which the wrongdoer has no control.”<sup>340</sup> The statute “does not apply to mere impoverishing of a man’s estate generally, but requires that damage to some specific property should be alleged and proved.”<sup>341</sup> It has been held that an action for deceit in letting a house infected with diphtheria survives under this section.<sup>342</sup>

The statutory limitation upon most actions of tort is six years.<sup>343</sup>

## SECTION VII

### REMEDY IN EQUITY

§ 281. **In general.**<sup>344</sup>—Of the numerous cases of relief under the various heads of equitable jurisdiction, very few have arisen in this state as between landlord and tenant. No attempt will be made to give a complete survey of this jurisdiction, but the reader is referred to general books on equity for matters not mentioned herein.<sup>345</sup>

§ 282. **Alterations.**<sup>346</sup>—A tenant may bring a bill in equity to enjoin the lessor from making alterations in the premises which will substantially impair their character and value, contrary to the covenant implied in the demise, even though not amounting to an eviction;<sup>347</sup> and, where the ground of equitable relief lapses during proceedings, as where the plaintiff’s lease expires, the bill will be retained for the assessment of damages.<sup>348</sup>

<sup>340</sup> Bigelow, J., in *Cutting v. Tower*, 14 Gray, 183.

<sup>341</sup> Holmes, J., in *Cutter v. Hamlen*, 147 Mass. 471.

<sup>342</sup> *Cutter v. Hamlen*, 147 Mass. 471.

<sup>343</sup> G. L., c. 260, § 2; R. L., c. 202, § 2; Pub. St., c. 197, § 1. As to actions in the nature of waste *quare*, see *supra*, § 276.

<sup>344</sup> *Cp.* equity as between landlord and tenant or either of them and third persons, *infra*, §§ 352, 355, 356.

<sup>345</sup> For a case where a bill was brought to secure the cancellation of a lease as in violation of a trust, see *Warner v. Bowdoin Square Baptist Church*, 148 Mass. 400.

<sup>346</sup> See also *Eviction*, *infra*, § 284.

<sup>347</sup> *Brande v. Grace*, 154 Mass. 210 (natural light); *Case v. Minot*, 158 Mass. 577. *Cp.* *Arafe v. Howe*, 228 Mass. 47.

<sup>348</sup> *Ibid.* *Cp.* as to mandatory injunctions, *Attorney-General v. Algonquin Club*, 153 Mass. 447; *Tucker v. Howard*, 128 Mass. 364; *Lynch v. Union Inst’n for Savings*, 158 Mass. 394; s. c., 159 Mass. 306.

But a lessor is not entitled to restrain his lessee from making alterations on the demised premises "if the right be only doubtful, or the injury complained of trivial; if it be one easily compensated in damages; if there exist no immediate cause for the application of the power of the court in this peculiar mode."<sup>349</sup> Accordingly, it was held that a lessee, who had hired a lot adjoining the demised premises and had erected a building thereon which darkened the windows of the demised buildings, could not be enjoined on account of the injury to the easements of light and air.<sup>350</sup>

§ 282a. **Building.**<sup>351</sup>—Where specific performance of an agreement to erect a building is refused, the court will retain jurisdiction in order to assess the damages.<sup>352</sup>

§ 282b. **Business, competing.**—Where a lessor covenants not to lease certain premises for a business competing with that of his lessee, he may be restrained from doing so.<sup>353</sup>

§ 283. **Documents.**—The purchaser of a term for years at an execution sale is not entitled to maintain a bill in equity to compel the lessee to deliver up to him the counterparts of his lease and subleases, if these documents are recorded,<sup>354</sup> for they are not necessary to aid the plaintiff's case at law.

§ 284. **Eviction.**—A tenant who is threatened with an eviction by the landlord, is not confined to an action for damages, but may have an injunction in equity to prevent the threatened injury to his rights,<sup>355</sup> provided the granting of the injunction will not work a greater injustice to the landlord.<sup>356</sup>

The court has stated these principles as follows: "When a plaintiff brings a bill to prevent a continuing trespass or a permanent injury to his real estate, the question whether he shall have a prohibitory injunction, or, if the work affecting

<sup>349</sup> *Atkins v. Chilson*, 7 Met. 398, 405, per Dewey, J. *Cp.* *Torrey v. Parker*, 220 Mass. 520 (bill to compel the closing of windows in a party wall).

<sup>350</sup> *Atkins v. Chilson*, 7 Met. 398.

<sup>351</sup> *Cf. supra*, § 96a. As to damages in an equity suit, *cf. supra*, § 144.

<sup>352</sup> *Wentworth v. Manhattan Market*, 218 Mass. 91.

<sup>353</sup> *Strates v. Keniry*, 231 Mass. 426.

<sup>354</sup> *McNeil v. Ames*, 120 Mass. 481.

<sup>355</sup> *Lynch v. Union Institution for Savings*, 158 Mass. 394; *Brande v. Grace*, 154 Mass. 210; *Nelson Theatre Co. v. Nelson*, 216 Mass. 30; *Wolff v. O'Brien*, 231 Mass. 487. *Cp.* *Coughlin v. Rosen*, 220 Mass. 220.

<sup>356</sup> *Lynch v. Union Institution for Savings*, 159 Mass. 306.

the property has been done, a mandatory injunction requiring the restoration of the estate to its former condition, depends on a consideration of all the equities between the parties. In general, where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiff's property, or to interfere with his rights, and has changed the condition of his real estate, he is compelled to undo, so far as possible, what he has wrongfully done affecting the plaintiff, and to pay the damages. In such a case the plaintiff is not compelled to part with his property at a valuation, even though it would be much cheaper for the defendant to pay damages in money than to restore the property. . . . One who has gone on wrongfully in a wilful invasion of the plaintiff's right in real estate has no equity to set up against the plaintiff's claim to have his property restored to him as it was before the wrong was done. . . . On the other hand, where, by an innocent mistake, erections have been placed a little upon the plaintiff's land, and the damage caused to the defendant by removal of them would be greatly disproportionate to the injury of which the plaintiff complains, the court will not order their removal, but will leave the plaintiff to his remedy at law."<sup>357</sup>

Therefore, where a lessor erected an addition to a building whereby front rooms "with all the rights and privileges thereunto belonging," were cut off from the street, but the lease had less than a year to run, it was held no mandatory injunction should issue, but the lessee should be compensated in money; especially as the completion of the work had been done after a decision of a lower court sustaining the lessor's right to do it.<sup>358</sup> And the same result was reached, where the lessor built a vault encroaching but a little upon the lessee's premises, the lease having only a year and a half more to run, and the premises not being substantially diminished in value.<sup>359</sup>

Where a lease is executed by only some of a number of tenants in common, and this fact is known to a sub-lessee, or might easily have been discovered by him at the time of filing a bill, the lessee cannot have an injunction in equity to prevent all the owners of the land from taking down a

<sup>357</sup> *Lynch v. Union Institution for Savings*, 159 Mass. 306, 308, per Knowlton, J.

<sup>358</sup> *Brande v. Grace*, 154 Mass. 210.

<sup>359</sup> *Lynch v. Union Institution for Savings*, 159 Mass. 306.

building which had become partially burned, and the principle that equity will retain control of the suit for the purpose of assessing damages does not apply.<sup>360</sup>

§ 285. Forfeiture.<sup>361</sup>—In case of a forfeiture by breach of covenant, and of proceedings to eject the tenant thereafter, the court may look into all the circumstances of the case, and determine whether on the whole it is just and proper that relief be granted.<sup>362</sup>

Thus, where there has been a failure to pay rent according to the terms of a lease caused by accident or mistake, equity will relieve against a forfeiture;<sup>363</sup> and even where the breach of covenant is wilful relief may be granted,<sup>364</sup> although in that case there must be a tender or payment of the sum due and any damages occasioned by the delay.<sup>365</sup> “All arrears of rent, interest and costs must be paid or tendered. If there be no special reason to the contrary, an injunction thereupon goes to restrain further steps to enforce the forfeiture. The grounds upon which a court of equity proceeds are that the rent is the object of the parties, and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete.”<sup>366</sup>

These principles were applied in an action at law, viz., a writ of entry, where by mistake a tenant tendered a quarter's rent a day or two before it was due. The court allowed an equitable defence, but ordered the tenant to pay interest, on the ground that he had had the use of the money since his tender, knowing the landlord would not receive it.<sup>367</sup> Relief in equity was granted, also, in a case where the lessee had agreed to

<sup>360</sup> *Tainter v. Cole*, 120 Mass. 162.

<sup>361</sup> See *supra*, §§ 112-133.

<sup>362</sup> See generally on the powers of equity to enjoin forfeitures, *Walker v. Brooks*, 125 Mass. 241; *Florence Co. v. Grover & Baker Co.*, 110 Mass. 1; *Gould v. Bugbee*, 6 Gray, 371, 375.

<sup>363</sup> *Atkins v. Chilson*, 11 Met. 112; *Sheets v. Seldon*, 7 Wall. (U. S.) 416, 422.

<sup>364</sup> *Atkins v. Chilson*, 11 Met. 112, 119; *Lundin v. Schoeffel*, 167 Mass. 465, 468; *Mactier v. Osborn*, 146 Mass. 399, 402; *Gordon v. Richardson*, 185 Mass. 492; *Finkovitch v. Cline*, 236 Mass. 196.

<sup>365</sup> *Sheets v. Seldon*, 7 Wall. 416, 422; 2 Taylor, Landl. & Ten., 9th ed., §§ 495, 496.

<sup>366</sup> *Sheets v. Seldon*, 7 Wall. 416, 421, per Swayne, J.

<sup>367</sup> *Atkins v. Chilson*, 11 Met. 112, 121.

pay rent in a certain kind of iron, but the lessor had not demanded it for many years, and it was no longer imported, the lessor not having given the lessee sufficient notice of his intention to demand payment in specie to enable the lessee to import it.<sup>368</sup> But where failure to pay rent when due becomes a settled habit so as to be rightly described as a general course of conduct, and that failure is accompanied by the frequent drawing of checks where there are no funds to meet them, equity will afford no relief.<sup>369</sup>

Where there are unsettled accounts between the lessor and the lessee, for goods sold, services rendered, or the like, and there is no agreement that such accounts shall be applied to the payment of the rent, they cannot be used as a defence at law.<sup>370</sup> But in equity the payment of the rent may be deferred until the rights of the parties are determined. Equitable relief is, however, confined to the case where the accounts cannot properly be taken at law.<sup>371</sup>

The covenant to pay taxes is like the covenant to pay rent, and equity will ordinarily relieve in cases of accident or mistake;<sup>372</sup> but not otherwise, especially where the estate has been sold for taxes in consequence.<sup>373</sup> "In respect to other covenants pertaining to lease-hold estates, where the elements of fraud, accident and mistake are wanting, and the measure of compensation is uncertain, equity will not interfere. It allows the forfeiture to be enforced if such is the remedy provided by the contract. This rule is applied to the covenant to repair, to insure, and not to assign."<sup>374</sup>

On the other hand, "where there has been a breach of a covenant to perform some collateral duty, such as to repair or to insure, which has been caused by accident or mistake, equity will relieve if the lessor can, by compensation or otherwise, be placed in the same condition as if the breach had not

<sup>368</sup> *Lilley v. Fifty Associates*, 101 Mass. 432, 435.

<sup>369</sup> *Darvirris v. Boston Safe Deposit and Trust Company*, 235 Mass. 76.

<sup>370</sup> *Morrill v. De la Granja*, 99 Mass. 383; *Fillebrown v. Hoar*, 124 Mass. 580, 584.

<sup>371</sup> *Fillebrown v. Hoar*, 124 Mass. 580, 584; *Sheets v. Selden*, 7 Wall. 416, 422.

<sup>372</sup> *Gordon v. Richardson*, 185 Mass. 492, *semble*.

<sup>373</sup> *Gordon v. Richardson*, 185 Mass. 492.

<sup>374</sup> *Sheets v. Selden*, 7 Wall. 416, 421, per Swayne, J.; *Gordon v. Richardson*, 185 Mass. 492. *Cp. Lundin v. Schoeffel*, 167 Mass. 465, 469.

occurred.”<sup>375</sup> Relief was accordingly granted where, through the mistake of insurance brokers, and without the fault of the lessee or any injury to the lessor, policies of insurance were renewed in a form which did not satisfy the covenant of the lease. The same principles, it seems, apply where the breach of covenant consists in making a noise inadvertently at a time of day when it annoys the lessor.<sup>376</sup> So, also, where there is a delay in the fitting up of premises as agreed, and where it may be found “that there was no want of good faith on the part of the plaintiff, that his delay was not wilful, that no demand had been made upon him for greater haste, that no notice had been given or complaint made to him on account of his delay, that the lessors had virtually stood by without objection, that no injury resulted to them from the delay, and that if they had not entered as they did the work of actually fitting up the premises would at once have been actively resumed,”<sup>377</sup> the court said: ‘The lessee’s failure in this case was merely an omission to do something promptly which was only useful to the lessors by way of security for the future payments of rent. It was not like a case where the omission caused a present injury or increase of risk to the lessors, as in the case of waste, non-repair, or non-insurance.’<sup>378</sup>

A breach of the covenant not to assign or underlet is usually a case where the lessor cannot be put *in statu quo*, and where therefore equity will not interfere.<sup>379</sup>

On a bill in equity for relief from a forfeiture at law the complainant cannot contend that there was no forfeiture at law.<sup>380</sup> *Quære*, whether a lessee can contest a forfeiture at law, and if unsuccessful seek relief in equity, or whether he must elect his remedy in the first instance.<sup>381</sup>

§ 286. Possession of premises.—When a tenant claims to be wrongfully excluded from the possession of a lease-hold estate, he has a plain, adequate, and complete remedy at law by summary process, and cannot go into equity to recover

<sup>375</sup> *Mactier v. Osborn*, 146 Mass. 399, 402, per Morton, C. J.

<sup>376</sup> *Lundin v. Schoeffel*, 167 Mass. 465.

<sup>377</sup> *Ibid.*

<sup>378</sup> *Lundin v. Schoeffel*, 167 Mass. 465, 468, per Allen, J.

<sup>379</sup> 1 Taylor, Landl. & Ten., 9th ed., § 413; *Sheets v. Selden*, 7 Wall. 416, 421; *Hill v. Barclay*, 18 Ves. 56.

<sup>380</sup> *Gordon v. Richardson*, 185 Mass. 492, 495.

<sup>381</sup> *Gordon v. Richardson*, 185 Mass. 492.



his estate or to have others enjoined from interfering with his occupation of the same.<sup>382</sup>

The right to possession can, however, be determined in equity as well as at law, and where the remedy at law is not complete recourse may be had to equity.<sup>383</sup>

§ 286a. **Reforming lease.**—In certain cases, where, owing to an alteration of circumstances, a lease no longer expresses the true intention of the parties, it seems a bill will lie to reform it.<sup>384</sup>

§ 287. **Rent.**—A bill in equity may sometimes be brought to collect rents where more than one person, being the heirs, next of kin, devisees or legatees of a deceased person, are liable for the debt;<sup>385</sup> but such a bill cannot be maintained in the absence of allegation or proof that the estate of the deceased person has been settled.<sup>386</sup> And the fact that two parties both claim the rent from a tenant, while it may justify the tenant in maintaining a bill of interpleader to determine whom he should pay, will not justify the two claimants in bringing a bill in equity for the rent under the provision of the statute as to parties having distinct interests.<sup>387</sup> It seems also that a creditor's bill will not lie to recover an unascertained amount due for use and occupation.<sup>388</sup>

As to when equity will enforce a claim for rent due from a married woman and expressly made a charge upon her separate estate, see *supra*, § 29.

One who has the beneficial user of a lease to another cannot be held in equity for the rent of the premises leased any more than at law.<sup>389</sup>

Where a lessor, upon taking possession of the leased premises during the term of the lease, finds thereon a stock of goods left there by a tenant, who has occupied under an arrange-

<sup>382</sup> *Weiss v. Levy*, 166 Mass. 290. See *Edwards v. Columbia Amusement Co.*, 215 Mass. 125; *Nelson Theatre Co. v. Nelson*, 216 Mass. 30, 34.

<sup>383</sup> *Nelson Theatre Co. v. Nelson*, 216 Mass. 30. See, also, *supra*, § 284.

<sup>384</sup> See *Arafe v. Howe*, 228 Mass. 47.

<sup>385</sup> See G. L., c. 197, § 31; R. L., c. 141, § 29; Pub. St., c. 136, § 29; Gen. St., c. 101, § 34; Rev. St., c. 70, § 16. *Warren v. Lyons*, 152 Mass. 310.

<sup>386</sup> *Grow v. Dobbins*, 128 Mass. 271.

<sup>387</sup> *McNeil v. Ames*, 120 Mass. 481. *Cp.* G. L., c. 214, § 3, cl. 3.

<sup>388</sup> *Moore v. Mansfield*, 182 Mass. 302.

<sup>389</sup> *Supra*, § 24.



ment with the lessee and has abandoned the premises, and the goods are subject to an unpaid mortgage, and the mortgagee declines to take possession of the goods, or to promise to pay the lessor for storing them, the latter cannot maintain a bill in equity against the tenant and the mortgagee to recover for use and occupation of the premises, and for storage of the goods.<sup>390</sup>

The interest of a debtor in rents of real estate, due and to become due under a lease of the same, cannot be reached by a creditor by a bill in equity.<sup>391</sup> "The only interest in the rents of real estate, therefore, which cannot be reached at law, is in so much of the rent as would accrue before an action at law if brought at the time of filing the bill, could be prosecuted to final judgment and levy of execution. How much such rent would be depends upon the question how long it would take to conduct an action at law to judgment. That is a question which is hardly capable of being determined in advance, and which it would be absurd for a court of chancery to undertake to try; and yet on the only ground upon which the plaintiffs seek to maintain their bill, the very extent of the jurisdiction and power of the court depends upon the determination of this question, inasmuch as the statute gives the court sitting in equity no authority to apply to the payment of the plaintiff's debt, the rents which would accrue after and be bound by a levy of execution at law. The provisions of the statutes for attaching and levying upon real estate and the rents and profits thereof must be deemed to have afforded the entire remedy which the legislature intended to give for applying to the payment of debts any title in real estate, or in the rents and profits thereof, which is a legal interest of such a nature as to be capable of being taken on execution at law."<sup>392</sup>

A bill in equity may, however, be maintained to reach

<sup>390</sup> *Field v. Roosa*, 159 Mass. 128.

<sup>391</sup> That is under G. L., c. 214, § 3, cl. 7; R. L., c. 159, § 3, cl. 7; St. 1902, c. 544, § 23; Pub. St., c. 151, § 2, cl. 11; Gen. St., c. 113, § 2, cl. 11, as amended by St. 1884, c. 285, § 1. *Schlesinger v. Sherman*, 127 Mass. 206; *Weil v. Raymond*, 142 Mass. 213; *McNeil v. Ames*, 120 Mass. 481. *Cp. Stone, Timlow & Co., Inc. v. Stryker*, 230 Mass. 72.

<sup>392</sup> *Schlesinger v. Sherman*, 127 Mass. 206, 209, per Gray, C. J. See *Taylor v. Robinson*, 7 Allen, 253; *Kilbourne Co. v. Standard Stamp Affixer Co.*, 216 Mass. 118.

property fraudulently conveyed, on a claim for loss under a covenant of indemnity of rent.<sup>393</sup>

"A court of equity will not in distributing assets among creditors afford a lessor any further remedy on account of future rent than a court of law."<sup>394</sup>

If a lease provides that the interest of the lessee ceases if it be attached or taken upon execution, this is the effect of the contract, and is not a ground for equity jurisdiction.<sup>395</sup>

In one case, a lease contained an agreement that certain wood on the land leased should be held by the lessor as security for the rent. A bill in equity was brought to restrain the lessee from sawing logs, and mingling them with others belonging to the lessee. On the facts in the case the bill was dismissed, but no question was raised as to the jurisdiction.<sup>396</sup>

Where a lessor fails to perform his covenants the lessee may bring a bill to enjoin him from collecting rent until the covenants are performed.<sup>397</sup>

Where a bill is brought to compel specific performance of an agreement in a lease to erect a building and also to recover rent due, the court will retain jurisdiction to assess the damages upon both claims even though specific performance is refused.<sup>398</sup>

§ 288. **Specific performance.**<sup>399</sup>—In general, equity will not decree specific performance in the case of ordinary covenants, but will leave the covenantee to his damages at law; but, where damages would be an inadequate remedy, or the plaintiff is disabled by a defective title from suing at law, then equity will interfere.<sup>400</sup> Thus, the tenant may have a decree for specific performance of an agreement to give a lease,<sup>401</sup> or a covenant to heat and light the premises,<sup>402</sup> or to renew the lease.<sup>403</sup>

<sup>393</sup> *Woodbury v. Sparrell Print*, 187 Mass. 426. *Cp.* G. L., c. 214, § 3, cl. 9. See *supra*, § 87.

<sup>394</sup> *Deane v. Caldwell*, 127 Mass. 242, 247, per Gray, C. J.

<sup>395</sup> *Weil v. Raymond*, 142 Mass. 206, 213.

<sup>396</sup> *Wilkie v. Day*, 141 Mass. 68.

<sup>397</sup> *Lumiansky v. Tessier*, 213 Mass. 182 (bill dismissed on the facts).

<sup>398</sup> *Wentworth v. Manhattan Market Co.*, 218 Mass. 91, 96.

<sup>399</sup> As to agreements to erect buildings, see *supra*, §§ 96, 282a.

<sup>400</sup> 2 *Taylor, Landl. & Ten.*, 9th ed., § 685; 1 *Wood, Landl. & Ten.*, 2d ed., 370.

<sup>401</sup> *Traveller Shoe Co. v. Koch*, 216 Mass. 412.

<sup>402</sup> *Jones v. Parker*, 163 Mass. 564. See *supra*, §§ 100, 104.

<sup>403</sup> *Supra*, § 91. See also *Toupin v. Peabody*, 162 Mass. 473; *Albiani*

But if he has violated a covenant, as by using the premises for a purpose forbidden by the terms of the lease, he cannot come into equity.<sup>404</sup> And, of course, when a lessee has to do something before liability attaches and has not done it, he cannot have specific performance.<sup>405</sup>

An agreement in a lease that "if the premises are for sale at any time, the lessee shall have the refusal of them," does not prevent the lessor from conveying the premises to a third person, or entitle the lessee to maintain a bill against the lessor and the purchaser, for specific performance of the provision.<sup>406</sup> And where one is in possession under a lease giving him an option to purchase, and does not, at the end of the lease, seek to consummate the purchase without delay, but, on the contrary seeks to postpone an appraisal provided for by the lease, he is not entitled to specific performance.<sup>407</sup>

Specific performance will not, of course, be decreed where the defendant is unable to give it. Thus, where a sub-lessee brought a bill against the lessee and the lessor to prevent a surrender of the lease, alleging an agreement with the lessee in the nature of a trust of the term, and it appeared that the lease had been already surrendered, it was held that specific performance being impossible, equity would decree damages for breach of the agreement.<sup>408</sup> And if the lessor has only a partial interest in the property, specific performance cannot be decreed.<sup>409</sup>

So where one has agreed to assign a lease and subsequently has forfeited his tenancy by becoming bankrupt, specific performance will not be decreed;<sup>410</sup> nor will it be decreed where the lease prohibits assignment without the consent of the lessor, and he refuses such consent.<sup>411</sup> And, in general, where owing to change of circumstances, specific per-

*v. Evening Traveller Co.*, 220 Mass. 20, 25; *Leominster Gas Light Co. v. Hillery*, 197 Mass. 267.

<sup>404</sup> *Gannett v. Albree*, 103 Mass. 372.

<sup>405</sup> *Diebold Safe & Lock Co. v. Morse*, 226 Mass. 342 (agreement for a lease).

<sup>406</sup> *Fogg v. Price*, 145 Mass. 513.

<sup>407</sup> *Washburn v. White*, 197 Mass. 540.

<sup>408</sup> *Milkman v. Ordway*, 106 Mass. 232.

<sup>409</sup> *Bergengren v. Aldrich*, 139 Mass. 259.

<sup>410</sup> *Ellis v. Small*, 209 Mass. 147.

<sup>411</sup> *Ibid.*

formance would be inequitable, compensation will be decreed in damages.<sup>412</sup>

The right to enforce specific performance may, of course, be lost by laches; but laches must be set up in the answer in order to be a defence.<sup>413</sup>

§ 289. **Summary process.**—Where the landlord brings summary process, and the tenant has good equitable defence, such as a renewal agreement the conditions of which have been fulfilled, the tenant may plead his defence in the action of summary process; or he may have an injunction against the same in a separate equity suit.<sup>414</sup>

§ 290. **Trespass.**—An injunction may be had to prevent trespass, but it must appear that the complainant has a good title to the land, and that the injury is irreparable in character and cannot be readily compensated in damages.<sup>415</sup> And it is not a ground of equity jurisdiction, on the ground of multiplied interests, that several parties claim to own the land.<sup>416</sup>

§ 291. **Waste.**—The supreme judicial and superior courts<sup>417</sup> have jurisdiction in suits concerning waste whether relating to real or personal estate. “Equitable waste may be enjoined at the suit of the remainder-man or reversioner against the tenant for years or for life; and also at the suit of mortgagees against mortgagors in possession.”<sup>418</sup> The jurisdiction which formerly extended only to cases of technical waste,<sup>419</sup> now probably extends to cases of trespass also.<sup>420</sup> Equity has an advantage over a common law action, in that it may be invoked by one

<sup>412</sup> *Wentworth v. Manhattan Market Co.*, 216 Mass. 374 (agreement to erect a building).

<sup>413</sup> *Albani v. Evening Traveller Co.*, 220 Mass. 20, 26 (renewal of lease).

<sup>414</sup> *Ferguson v. Jackson*, 180 Mass. 557.

<sup>415</sup> *Aldrich on Eq. Pl.*, 2d ed., 270; *Winslow v. Nayson*, 113 Mass. 411; *Washburn v. Miller*, 117 Mass. 376. *Cp. Atkins v. Chilson*, 7 Met. 398.

<sup>416</sup> *Attaquin v. Fish*, 5 Met. 140, 151.

<sup>417</sup> G. L., c. 214, §§ 1, 2; c. 242, §§ 1, 2; R. L., c. 159, § 2; c. 185, §§ 1, 2; Pub. St., c. 151, § 2, cl. 9; Gen. St., c. 113, § 2, cl. 9; Rev. St., c. 81, § 8; c. 105, § 14; St. 1827, c. 88.

<sup>418</sup> *Aldrich, Eq. Plead.*, 2d ed., 270; 1 Wash. Real Prop., 125.

<sup>419</sup> *Attaquin v. Fish*, 5 Met. 140. See *Atkins v. Chilson*, 7 Met. 398. This was on account of the limited powers then possessed by the court. *Aldrich, Eq. Pl.*, 2d ed., 340.

<sup>420</sup> *Aldrich, Eq. Plead.*, 2d ed., 340 seq. See *Charles River Bridge v. Warren Bridge*, 6 Pick. 376, 394; *Essex Lunch, Inc. v. Boston Lunch Co.*, 229 Mass. 457, 559.

who has not the next estate to the tenant as well as by the intermediate remainder-man.<sup>421</sup> It also may be invoked where a tenant holds without impeachment of waste, so that an action of waste or tort would not lie, if the tenant exceeds the reasonable use which an owner in fee would make of the land.<sup>422</sup>

§ 292. **Damages.**<sup>423</sup>—"In cases where a bill in equity is brought in good faith, and the specific relief sought is defeated by a disability of the defendant to comply with a decree for specific relief, caused after the suit or after the date of the agreement relied on, it is the rule in this country that the court will retain the bill, and afford relief by way of compelling compensation to be made, provided the plaintiff brought his bill without knowledge of the disability, in good faith seeking equitable relief, supposing and having reason to suppose himself entitled to such equitable relief.<sup>424</sup> And in *Milkman v. Ordway*,<sup>425</sup> this court decided that the rule with the same qualifications extended to all cases where a defect of title, right or capacity in the defendant to fulfil his contract is developed by his answer, or in the course of the hearing."<sup>426</sup>

Therefore, where the plaintiff has no standing in equity because he claims under a lease executed by only a portion of the tenants in common owning land, his bill must be dismissed entirely.<sup>427</sup>

§ 293. **Venue of actions.**—"Suits in equity in said courts [Supreme and Superior] may be brought in any county in which a transitory action between the same parties might be brought, as well as in counties in which it is elsewhere provided that such suits may be brought."<sup>428</sup>

## SECTION VIII

### REAL AND MIXED ACTIONS

§ 294. **Writ of entry.**—Writs of entry are but little used as between landlords and tenants at the present time, the

<sup>421</sup> 1 Wash. Real Prop., 6th ed., § 307; *Attaquin v. Fish*, 5 Met. 140, 147; 2 Story, Eq. Jur., § 913.

<sup>422</sup> *Ibid.*; 1 Taylor, Landl. & Ten., 9th ed., § 355.

<sup>423</sup> As to damages for failure to renew a lease, see *supra*, § 91.

<sup>424</sup> *Tainter v. Cole*, 120 Mass. 162; *Lynch v. Union Institution for Savings*, 159 Mass. 309; *Brande v. Grace*, 154 Mass. 210 (all cited more fully *supra*).

<sup>425</sup> 106 Mass. 232. See Specific Performance, *supra*, § 288.

<sup>426</sup> *Tainter v. Cole*, 120 Mass. 162, 165, per Morton, J.

<sup>427</sup> *Tainter v. Cole*, 120 Mass. 162.

<sup>428</sup> G. L., c. 214, § 5; R. L., c. 159, § 5; St. 1883, c. 223, § 13.

remedy provided by statute in the so-called "summary process" being much more simple and expeditious. The chief difference between the two remedies is that a writ of entry is the proper one in which to try title, while summary process cannot be used for that purpose, but only determines the possession. Space forbids a complete account of writs of entry, and for other points than the few decided in actions against tenants for years and at will noted here, the reader is referred to works on real actions.<sup>429</sup>

It is provided by statute that "If the person in possession [of the premises demanded in a writ of entry] has actually ousted the demandant or withheld from him the possession of the land, he may, at the election of the demandant, be considered as a disseisor for the purpose of trying the right, although he claims an estate less than a freehold."<sup>430</sup> "So that a tenant for years or at will, if he refuses to yield up the possession to the demandant, may thereby become, at the election of the latter a disseisor and liable to a writ of entry for the purpose of trying the title."<sup>431</sup> And the fact that a tenant for years is in possession will not prevent the landlord from having a right of entry into the premises as against a third person, who is a disseisor

<sup>429</sup> See Stearns on Real Actions, 2d ed. (1831); Jackson on Real Actions (1828); G. L., c. 237. By St. 1904, c. 448, § 1, the jurisdiction in writs of entry was transferred to the Land Court. See G. L., c. 185, § 25.

The action was used in *Coffin v. Lunt*, 2 Pick. 70; *Trask v. Wheeler*, 7 Allen, 109; *Holmes v. Turner's Falls Co.*, 150 Mass. 535; s. c., 142 Mass. 590.

<sup>430</sup> G. L., c. 237, § 7; R. L., c. 179, § 6; Pub. St., c. 173, § 6; Gen. St., c. 134, § 6; Rev. St., c. 101, § 7. Cited in *Dolby v. Miller*, 2 Gray, 135; *Twomey v. Linnehan*, 161 Mass. 91.

*Historical.* "Prior to the enactment of the above provision, a writ of entry could not be maintained against anyone who was not tenant of the freehold; but among other changes which were made by the revised statutes, in order to simplify the proceedings in real actions, it was provided . . . [as above]. In such case the tenant is made tenant of the freehold by disseizin. . . . If a person in possession does not deny the right of the demandant, he can yield up possession of the land, when demanded in the country; or he can disclaim title thereto if a writ of entry is brought without any previous demand and in such case the action cannot be maintained against him. That such was the purpose of this provision in the revised statutes is manifest from the notes of the commissioners to c. 101, § 6, and c. 107, § 7." Bigelow, J., in *Dolby v. Miller*, 2 Gray, 135. Cp. *Shelton v. Atkins*, 22 Pick. 74.

<sup>431</sup> *Dolby v. Miller*, 2 Gray, 135, Bigelow, J.; *Wheelwright v. Freeman*, 12 Met. 154; *Baker v. Adams*, 5 Cush. 99.

within the meaning of the statute; for the disseisin has ousted the tenant as well as the landlord.<sup>432</sup>

A lease for years cannot be availed of by the tenant under a plea of *nul disseisin*, for this plea asserts a freehold in himself. The proper method is to plead a specific defence, alleging non-tenure of the freehold and setting forth the right of possession under the lease.<sup>433</sup>

By statute, a real action, such as a writ of entry or of ejectment, survives to the heirs or devisees of the demandant against the heirs or devisees of the tenant.<sup>434</sup> Notice of such proceeding must also be recorded in the registry of deeds for the county in which the land is situated, in order to affect the title to such real estate "or the use and occupation thereof or the buildings thereon," as against other persons than the parties, their heirs and devisees and parties having actual notice of the proceedings.<sup>435</sup>

As to the proceedings where a judgment for possession has been obtained by the plaintiff, see *infra*, § 312.

The demandant may amend his writ by changing to an action of ejectment.<sup>436</sup>

§ 295. Ejectment.<sup>437</sup>—The common law writ of ejectment, while rarely used, has never been abolished in this state.<sup>438</sup>

<sup>432</sup> *Brewer v. Stevens*, 13 Allen, 346. See G. L., c. 237, § 4.

<sup>433</sup> *Trask v. Wheeler*, 7 Allen, 109.

<sup>434</sup> G. L., c. 228, §§ 8–11; R. L., c. 171, §§ 9–12; Pub. St., c. 165, §§ 14–18; *Brigham v. Hunt*, 152 Mass. 257.

As to the abatement of a real action at common law by the death of either party, see *Drake v. Curtis*, 1 Cush. 395; *Cutts v. Haskins*, 11 Mass. 56; *Holmes v. Holmes*, 2 Pick. 23; *Thomas v. Smith*, 2 Mass. 479; *Mitchell v. Starbuck*, 10 Mass. 5; *Alley v. Hubbard*, 19 Pick. 243; *Brown v. Wells*, 12 Met. 501.

<sup>435</sup> G. L., c. 184, § 15; R. L., c. 134, § 12; Pub. St., c. 126, § 13; St. 1877, c. 229, § 13; St. 1897, c. 463.

<sup>436</sup> *Fay v. Taft*, 12 Cush. 448.

<sup>437</sup> See generally, 2 Taylor, Landl. & Ten., 9th ed., §§ 698–712; Newell on Ejectment (1892); Adams on Ejectment, 4th Amer. ed. (1854); Chit. Pl., 16th Amer. ed. (1876), Chap. II, Sect. V.

<sup>438</sup> *Hodgkins v. Price*, 137 Mass. 13; *Merrill v. Bullock*, 105 Mass. 486; *Fay v. Taft*, 12 Cush. 448; *Miller v. Prescott*, 163 Mass. 12; *Austin v. Kimball*, 167 Mass. 300.

*Historical.* "In the revision of the statutes in 1836, great changes were made in real and mixed actions. Writs of right and of formedon were abolished and writs of entry were greatly modified but no change



This action is a mixed action, "somewhat between real and personal; for therein are two things recovered, as well restitution for the term of years as damages for the ouster or wrong."<sup>439</sup>

It can be maintained only by one who has the right of possession;<sup>440</sup> but no proof of title in the plaintiff is required, as the principle that the tenant is estopped to deny his landlord's title applies in this action;<sup>441</sup> and it can be used to recover possession of a room or a chamber without any land.<sup>442</sup> Where the plaintiff in a writ of entry was possessed only of a term for years, so that the writ of entry would not lie, he was allowed to amend by changing the action into an action of ejectment;<sup>443</sup> and the same was held in an action of summary process where it appeared the court had no jurisdiction.<sup>444</sup>

It is now provided by statute that "in an action of ejectment or *quare ejecit* for the recovery of the possession of real property for a term of years or other interest for which such action may be maintained, the action may be described in the writ as an action of ejectment, and a declaration in general terms substantially in the form set out in the schedule at the end of this chapter, shall be sufficient; and, if the defendant is wrongfully in possession, it shall not be material how he obtained such possession. The plaintiff shall annex to such declaration a statement of the particulars of his title, which shall be deemed part of the declaration, and the court may require him to file a statement of such other particulars, as to damages claimed or otherwise, as it shall deem proper. The writ need not contain the particulars of title, and if the writ does not contain them, they shall be filed in the same manner and the like provisions of law shall be applicable thereto as in the case of a declaration in a personal action."<sup>445</sup>

By statute, a writ of ejectment survives to the heirs and

was made in the common law writ of ejectment. Rev. Sts., c. 101, § 51," per Morton, C. J., in *Hodgkins v. Price*, 137 Mass. 13. Cp. *Higbee v. Rice*, 5 Mass. 344; *Chapman v. Gray*, 15 Mass. 439.

<sup>439</sup> 3 Bl. Com. 199; *Hodgkins v. Price*, 137 Mass. 13. See *Cummings v. Noyes*, 10 Mass. 433.

<sup>440</sup> *Austin v. Kimball*, 167 Mass. 300.

<sup>441</sup> 2 Taylor, Landl. & Ten., 9th ed., § 705. See *supra*, §§ 205-208.

<sup>442</sup> *Parker, C. J.*, in *Otis v. Smith*, 9 Pick. 293, 297.

<sup>443</sup> *Fay v. Taft*, 12 Cush. 448; *Merrill v. Bullock*, 105 Mass. 486, 488.

<sup>444</sup> *Merrill v. Bullock*, 105 Mass. 486.

<sup>445</sup> G. L., c. 231, § 9. As to pleading before this statute, see *Hodgkins*



devisees of the demandant, as against the heirs and devisees of the tenant.<sup>446</sup>

§ 296. **Measure of damages.**—In this action “the measure of damages should be, as in an action of trespass for mesne profits, a sum which, upon just and equitable principles, will furnish such compensation or indemnity. The plaintiff should be placed in as good a position as he would have been in if the defendants had not dispossessed him.”<sup>447</sup> Therefore, where leased buildings were partly destroyed by fire, and the ejector in good faith and acting under advice of counsel, took down the buildings partly destroyed, and put up more expensive ones, the measure of damages is the same as if the ejector had wrongfully withheld possession of the demised premises for the same length of time and in the same condition as when he entered.<sup>448</sup>

In the case of a building underlet to various tenants, the gross rents and profits for the period of detention are subject to a reduction by the amount of the fair value of the necessary time and labor involved in the case and management of the premises and in the collection of rents. “In order to realize his rents and profits, if he had been in possession, he [the plaintiff] would have been obliged either to pay such sum, or to furnish an equivalent in his own labor and services.”<sup>449</sup>

The plaintiff who succeeds in this action is entitled to simple interest on the amount found to be the net profits of the premises, from the end of the year, for each year while he was dispossessed. And the fact that, by the terms of the lease, rent was payable quarterly, does not entitle the plaintiff to interest from the end of each quarter upon such quarter’s instalment.<sup>450</sup>

## SECTION IX

### FORCIBLE ENTRY AND DETAINER; SUMMARY PROCESS

§ 297. **In general.**—“If a forcible entry into land or tenements has been made, if a peaceable entry has been made and  
*v. Price*, 137 Mass. 13. As to obtaining possession under a judgment see *infra*, § 312.

<sup>446</sup> G. L., c. 228, §§ 8–11.

<sup>447</sup> *Hodgkins v. Price*, 141 Mass. 162, per Morton, C. J.

<sup>448</sup> *Hodgkins v. Price*, 141 Mass. 162.

<sup>449</sup> *Ibid.*

<sup>450</sup> *Ibid.*

the possession is unlawfully held by force, if the lessee of land or tenements or a person holding under him holds possession without right after the determination of a lease by its own limitation or by notice to quit or otherwise, or if a mortgage of land has been foreclosed by a sale under a power therein contained or otherwise, the person entitled to the land or tenements may recover possession thereof under this chapter.”<sup>451</sup>

A person in whose favor the land court has entered a decree for confirmation and registration of his title to land may in like manner recover possession thereof, except where the person in possession or any person under whom he claims has erected buildings or improvements on the land, and the land has been actually held and possessed by him or by those under

<sup>451</sup> G. L., c. 239, § 1; R. L., c. 181, § 1; St. 1899, c. 120; Pub. St., c. 175, § 1; St. 1879, c. 237; Gen. St., c. 137, §§ 2, 3; Rev. St., c. 104, § 2; St. 1825, c. 89, § 1; St. 1847, c. 267, § 2; St. 1857, c. 55. See also G. L., c. 231, § 9.

Cited in *Braman v. Perry*, 12 Pick. 119; *Ferrin v. Kenney*, 10 Met. 297; *Hildreth v. Conant*, 10 Met. 300; *Howard v. Merriam*, 5 Cush. 579; *Hastings v. Pratt*, 8 Cush. 123; *Elliott v. Stone*, 12 Cush. 176; *Currier v. Barker*, 2 Gray, 224, 228; *Hodgkins v. Price*, 137 Mass. 17; *Warren v. James*, 130 Mass. 540; *Harris v. Carmody*, 131 Mass. 51; *Judd v. Tryon*, 131 Mass. 345; *Williams v. McGaffigan*, 132 Mass. 122; *Lowe v. Moore*, 134 Mass. 259; *Lawton v. Savage*, 136 Mass. 114; *Kinsley v. Ames*, 2 Met. 29; *Hollis v. Pool*, 3 Met. 350; *Saunders v. Robinson*, 5 Met. 344; *Benedict v. Morse*, 10 Met. 223; *The Fifty Associates v. Howland*, 11 Met. 101; *Benedict v. Hart*, 1 Cush. 488; *Wheeler v. Dascomb*, 3 Cush. 287; *The Fifty Associates v. Howland*, 5 Cush. 215; *Larned v. Clarke*, 8 Cush. 31; *Dakin v. Allen*, 8 Cush. 34; *Furlong v. Leary*, 8 Cush. 410; *Green v. Tourtellott*, 11 Cush. 227; *King v. Dickerman*, 11 Gray, 480; *Mitchell v. Shanley*, 15 Gray, 319; *Boyle v. Boyle*, 121 Mass. 85; *Lyon v. Cunningham*, 136 Mass. 538; *Rooney v. Gillespie*, 6 Allen, 75; *Alexander v. Carew*, 13 Allen, 72; *Thayer v. Carew*, 13 Allen, 82; *Page v. Dwight*, 170 Mass. 29; *Clark v. Griffin*, 148 Mass. 541; *Kiernan v. Linnehan*, 151 Mass. 545; *Hart v. Bouton*, 152 Mass. 441; *Casey v. King*, 98 Mass. 503; *Marsters v. Cling*, 163 Mass. 477; *Lewis v. Jackson*, 165 Mass. 481; *Steese v. Johnson*, 168 Mass. 17; *Allen v. Chapman*, 168 Mass. 442; *Lash v. Ames*, 171 Mass. 490; *Ferguson v. Jackson*, 180 Mass. 557; *Fitch v. Windram*, 184 Mass. 68; *New England Mutual Life Ins. Co. v. Wing*, 191 Mass. 195; *Gunsenhiser v. Binder*, 206 Mass. 434; *Boston v. Talbot*, 206 Mass. 82, 92; *Proctor v. Moran*, 213 Mass. 405; *Gloyd v. Davis*, 214 Mass. 238; *Edwards v. Columbia Amusement Co.*, 215 Mass. 125; *Binder v. Gunsenheimer*, 217 Mass. 518; *McNamara v. Dorey*, 219 Mass. 151; *Scotti v. Bullock*, 225 Mass. 581; *De Wolfe v. Roberts*, 229 Mass. 410.

*Historical.* “The existing statute concerning forcible entry and de-

whom he claims for six years next before the date of said decree or was held at the date of said decree under a title which he had reason to believe good.<sup>452</sup>

It will be seen that the statute provides a means of recovering possession, as regards landlords and tenants in three classes of cases. (1) Where a forcible entry has been made. (2) Where there is a forcible detention of premises, though the entry may have been peaceful. (3) Where a tenant holds over after the termination of his tenancy. The first two of these cases may be conveniently grouped together.

"The anomalous character of the process of forcible entry, as it exists under our statutes, has been frequently pointed out. It early provided the same remedy for two distinct causes of action: one where there was strictly a forcible entry upon or detainer of real estate; the other where a tenant unlawfully held possession of the premises after the termination of his lease; and, in either case, was intended to restore to possession him who was lawfully entitled thereto.<sup>453</sup> To these the legislature has recently added a third,<sup>454</sup> which enables a mortgagee whose mortgage is foreclosed, if kept out without tainer is substantially a re-enactment of St. 1784, c. 8, which was preceded by a colonial statute of similar import. St. 13 Wm. III, c. 71. The provisions of both these last named acts, with some modifications, were taken from the statutes of England on the same subject, more especially from St. 8 Hen. VI, c. 9, and so far as they made provision for the restitution or 'reseizing' of land and tenements forcibly entered or detained they did not essentially differ therefrom. . . . [Adjudications] made prior to the separation from the mother country, and in relation to legislative provisions which were subsequently enacted by the general court of the colony, must be deemed to be an authoritative exposition of the meaning of the statute, and to have been adopted and acted upon when similar statutes were passed by the colonial legislature. . . ." *Presbrey v. Presbrey*, 13 Allen, 281, 284, Bigelow, C. J.

For a comprehensive survey of all the statutes on this subject, see opinion of Barker, J., in *Page v. Dwight*, 170 Mass. 29. Also remarks of Lord, J., in *Hodgkins v. Price*, 132 Mass. 196, 200; and of Morton, J., in *Boyle v. Boyle*, 121 Mass. 85. But note that some remarks of Lord, J., have been modified by the decision in *Page v. Dwight*. See also Crocker, *Notes on Common Forms*, 4th ed., 341.

On the general subject, see the *Right of a Landlord to regain Possession by Force*, by Joseph Willard, 4 Am. Law Rev. 429 (1870).

<sup>452</sup> G. L., c. 239, § 1.

<sup>453</sup> *Howard v. Merriam*, 5 Cush. 563.

<sup>454</sup> St. 1879, c. 237.

right, to put himself in possession by this process.”<sup>455</sup> “Formerly some doubt was entertained whether there must not be a forcible entry as well as a forcible detainer to lay the foundation of this process. But this is now rendered clear by the statute, which gives this process either when any forcible entry shall be made, or when an entry shall be made in a peaceable manner, and the possession shall be unlawfully held by force.”<sup>456</sup>

“There shall be no recovery under this chapter of any land or tenements of which the defendant, his ancestors or those under whom he holds the land or tenements, have been in quiet possession for three years next before the commencement of the action unless the defendant’s estate therein is ended.”<sup>457</sup> It has been held that evidence of possession by the defendant and his privies could be introduced under an answer denying that he held the premises unlawfully or against the right of the plaintiff.<sup>458</sup> A mere entry by a mortgagee to foreclose a mortgage, without taking possession, is not such an interruption of possession as is contemplated by the statute.<sup>459</sup>

This process cannot be used to try the title to real estate; for that the proper remedy is a writ of entry.<sup>460</sup> This process determines only the right to present possession, and cannot be invoked by one who has gained a temporary possession by unlawful force.<sup>461</sup> But inasmuch as the right to present possession may depend upon the validity of a lease, such validity may be tried in summary process.<sup>462</sup> Evidence that the deed under which the plaintiff claims the premises was executed under duress, can be given under an answer containing a general denial only.<sup>463</sup>

<sup>455</sup> Devens, J., in *Lawton v. Savage*, 136 Mass. 111, 113.

<sup>456</sup> *Kinsley v. Ames*, 2 Met. 29.

<sup>457</sup> G. L., c. 239, § 8; R. L., c. 181, § 10; Pub. St., v. 175, § 10; Gen. St., c. 137, § 4; Rev. St., c. 104, § 3; Act of Amend., § 14; St. 1784, c. 8, § 3. Cited in *Wheeler v. Dascomb*, 3 Cush. 287; *King v. Dickerman*, 11 Gray, 481; *Mitchell v. Shanley*, 12 Gray, 207; *Edwards v. Columbia Amusement Co.*, 215 Mass. 128.

<sup>458</sup> *Mitchell v. Shanley*, 12 Gray, 206.

<sup>459</sup> *Ibid.*

<sup>460</sup> *Page v. Dwight*, 170 Mass. 29, 35, 40; *Edwards v. Columbia Amusement Co.*, 215 Mass. 125, 128.

<sup>461</sup> *Hodgkins v. Price*, 132 Mass. 196; *Lawton v. Savage*, 136 Mass. 111.

<sup>462</sup> *Weiss v. Levy*, 166 Mass. 290. *Cp.* *Edwards v. Columbia Amusement Co.*, 215 Mass. 125.

<sup>463</sup> *Harris v. Carmody*, 131 Mass. 51.

It is also directly provided by statute that "No person shall make an entry into land or tenements except in cases where his entry is allowed by law, and in such cases he shall not enter by force, but in a peaceable manner."<sup>464</sup> A provision in a lease allowing the lessor upon breach of covenant by the lessee to forcibly expel the lessee and remove his effects, is not void under this section.<sup>465</sup> Forcible entry is also an offence indictable under the common law of Massachusetts.<sup>466</sup>

§ 298. Forcible entry and detainer.<sup>467</sup>—Right to maintain.—If the entry is forcible, the fact that it is otherwise lawful, and that the one entering is entitled to the possession, will not prevent liability to this process;<sup>468</sup> on the other hand, the process is not given to one who is not entitled to the possession of the demanded premises as against the defendant.<sup>469</sup>

"It appears that both the course of legislation and the language of the present statutes show that the process cannot be maintained by one who has been forcibly put out from a peaceable possession lawfully obtained, if he was so evicted by one who had the title and right of possession."<sup>470</sup> So also,

<sup>464</sup> G. L., c. 184, § 18; R. L., c. 134, § 15; Pub. St., c. 126, § 15; Gen. St., c. 137, § 1; Rev. St., c. 104, § 1; St. 1784, c. 8, § 1.

Cited in *Meader v. Stone*, 7 Met. 151; *Com. v. Shattuck*, 4 Cush. 146; *Fifty Associates v. Howland*, 5 Cush. 218; *Gleason v. Gleason*, 8 Cush. 33; *Hawkes v. Brigham*, 16 Gray, 563; *Page v. Dwight*, 170 Mass. 29.

G. L., c. 279, § 5, provides that "If no punishment for a crime is provided by statute, the court shall impose such sentence, according to the nature of the crime, as conforms to the common usage and practice in the commonwealth. If a person is convicted of a misdemeanor punishable by imprisonment, he may, unless otherwise expressly provided, be sentenced to imprisonment either in the jail or in the house of correction."

<sup>465</sup> *Fifty Associates v. Howland*, 5 Cush. 218.

<sup>466</sup> *Commonwealth v. Shattuck*, 4 Cush. 141; *Sampson v. Henry*, 13 Pick. 36; *Low v. Elwell*, 121 Mass. 309, 312; *Page v. Dwight*, 170 Mass. 29, 35; *Commonwealth v. Haley*, 4 Allen, 318.

<sup>467</sup> *Cp. supra*, § 182.

<sup>468</sup> 4 Bl. Com. 148; *Presbrey v. Presbrey*, 13 Allen, 281, 284. So *Crocker's Notes on the Rev. Laws*, 776. See *Langdon v. Potter*, 3 Mass. 215, 218. *Presbrey v. Presbrey*, however, was a case of tenancy in common, and cannot be cited for more than the point that one tenant in common cannot forcibly eject his co-tenant or forcibly detain the premises from him. In this case the plaintiff has a right to enter, and the defendant has an equal right to hold.

<sup>469</sup> *Page v. Dwight*, 170 Mass. 29.

<sup>470</sup> *Ibid.*, p. 38, per Barker, J.

it is said, that "Where one in the peaceable possession of premises is forcibly ousted therefrom, and subsequently himself regains possession, the person who had ousted him cannot treat the temporary possession he had himself gained by force as lawful, and upon that ground maintain an action for forcible entry upon himself."<sup>471</sup>

In *Hodgkins v. Price*,<sup>472</sup> it appeared that the plaintiff with twenty men, and very early in the morning before the tenants had arrived at their respective places of business, succeeded in forcibly entering the building, and by barricading the doors and otherwise, attempted to prevent the tenants from entering the building. When the tenants arrived they took possession and ejected the intruders, who thereupon commenced this process. The court said:<sup>473</sup> "It is to be remembered that this is an action, not for the purpose of trying the rights of parties to the title to the estate, but is in its nature an action by which one who has been in the enjoyment of an estate peaceably may be restored to that enjoyment, as against one who forcibly deprives him of it. . . . Take for illustration any one of those tenants who had been peaceably occupying his apartments every day for years. Such tenant on a morning in July found a stranger occupying and claiming to occupy by force under a title in conflict with his own, the premises which had been his daily resort under a lease which he had been enjoying for years. That is the precise case in which this process will lie. If there is any one paramount rule of law, it is that titles and rights under them shall be settled by law, and not by force. If therefore these parties who had been in peaceable possession of this estate finding themselves ejected or kept out by force, can be restored by process of law to their possession, how absurd is the proposition that those who ejected them can also be restored to the fraudulent possession which they had obtained. If one who gets possession by force can under this process be restored to that possession, then those who are thus ejected may in their turn eject those who by force had ejected them, and the law will continue to put in, *toties quoties*, the respective parties as they have been variously thrown out. Nothing can be more absurd than the idea that each of the parties can at the same time have the right to this process for the same

<sup>471</sup> *Lawton v. Savage*, 136 Mass. 111, 113, per Devens, J.

<sup>472</sup> 132 Mass. 196.

<sup>473</sup> Lord, J., p. 197.

estate. The process is for the purpose of restoring one to a possession which has been kept from him by force. It is not a process against a party who resists the right of possession by force, but it is for an interference with an actual possession." In commenting upon this case *Barker, J.*, said in *Page v. Dwight*,<sup>474</sup> "The same result reached in *Hodgkins v. Price* would follow, whether as intimated in the opinion, our process for forcible entry is 'simply a quieting process,' by which any party in possession of an estate shall not be dispossessed by force, but his possession shall be preserved to him; or whether it is a more restricted remedy, to be given only where the party who invokes it shows not only that he has been put out by force, but that he is also entitled to possession. Under either construction the plaintiff in *Hodgkins v. Price* could not have the statute process; as against him, the facts did not constitute a forcible entry, but merely a resistance and neutralization of his own attempted force. . . . The opinion, while reviewing in part the course of legislation, makes no mention of the facts, that the portion of St. 1851, c. 233, which substituted for the forcible entry and detainer provisions of Rev. St. c. 104, another system, in which without regard to the state of the title or to the right of possession, a remedy was clearly given to restore anyone put out by force, was quickly repealed by St. 1852, c. 312, § 86, and that the former system, substantially identical with the present one, and giving the remedy only to those entitled to the premises, was permanently restored."

A writer in the *American Law Review* <sup>475</sup> has expressed the same view in other words. "Where the question of title is examinable, possession will not be awarded on a summary proceeding to one who at the time of judgment is not entitled to the premises, whatever right he may have had to institute the proceeding," and "it seems to be a correct conclusion, that in Massachusetts restitution by the summary statutory proceeding will not be given in any case where there is not title enough to maintain trespass."

The process may be maintained by one of two tenants in common against his co-tenant who attempts to hold the premises against him, but the plaintiff is entitled only to a joint

<sup>474</sup> 170 Mass. 29, 39.

<sup>475</sup> 4 Am. Law Rev. 429, 448, citing *King v. Lawson*, 98 Mass. 309; *Casey v. King*, 98 Mass. 503.



possession with the defendant.<sup>476</sup> It has also been held that the owner of a house might resist those who came to remove personal property from the room of a tenant, the owner having no means of knowing whether their claim was rightful; and that it was reasonable to ask them to wait until the tenant returned.<sup>477</sup>

As to the right of a landlord to enter upon a tenant at sufferance see also *supra*, §§ 181, 182.

§ 299. Definition of forcible entry.<sup>478</sup>—"A mere unlawful entry into lands, though it would justify the common averment of *vi et armis*, or force and arms, is not the forcible entry contemplated by the statute. It must be something more, either an original entry or a subsequent detainer with strong hand, and this may be by the use of actual force and violence, or by menace of force, accompanied by arms and a manifest intent to carry such threat into effect, or by a show of force calculated to create terror and alarm, by an exhibition of arms, a display of numbers, or other means manifesting an open and visible determination forcibly to make the entry or forcibly to resist the entry of another."<sup>479</sup> "Such force as will tend to a breach of the peace may not be used; but only such force is permissible as would sustain a plea in justification of *moliter manus imposuit*. That degree of force which the law allows a man to use in defence of his lawful possession, it does not allow him to use in recovering property of which he has been dispossessed, if it be tumultuous or riotous, or tends to a breach of the peace. It does not allow a breach of the peace to regain possession of property, or in redress of private wrongs."<sup>480</sup>

In one case, the two defendants with a workman went to a tenement in the occupation of the plaintiff but in which there was no one at the time, and the door of which was fastened with a padlock; demanded the key from the plaintiff's servant; and on his refusal ordered their workmen to enter the

<sup>476</sup> *Presbrey v. Presbrey*, 13 Allen, 281. Cp. *Grundy v. Martin*, 143 Mass. 279; *Rising v. Stannard*, 17 Mass. 282; *Cunningham v. Pattee*, 99 Mass. 248.

<sup>477</sup> *Drury v. Hervey*, 126 Mass. 519.

<sup>478</sup> See also on this subject, *supra*, § 182.

<sup>479</sup> *Saunders v. Robinson*, 5 Met. 343, 345, per Shaw, C. J.; *Commonwealth v. Shattuck*, 4 Cush. 141, 145; *Commonwealth v. Dudley*, 10 Mass. 403, 409.

<sup>480</sup> May, Criminal Law, 3d ed., § 168.



premises through a hole in the floor. The workmen did so; and by his assistance, and with the aid of an axe which they brought with them, they removed the padlock, and entered and kept possession of the premises. They used no violence in word or act to the plaintiff's servant. It was held that there was no forcible entry.<sup>481</sup> The court said that the fact of carrying an axe to a saw mill could not be supposed to excite terror, and the removal of the padlock after a peaceable entry was a merely mechanical force not directed against the plaintiff's agent. On the other hand an assault upon the tenant by agents of the landlord, in striking him with an iron bar is unjustifiable.<sup>482</sup>

Whether any entry on land by virtue of an extent, although the execution be extended on the land of a person not a party to it, is a forcible entry, *quære*.<sup>483</sup>

§ 300. Definition of forcible detainer.—In general, the same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also.

"The authorities agree, that it is a forcible detainer when one who has entered peaceably threatens corporal damage to one who rightfully attempts to enter, or repels him with violence. . . . If menaces of violence and bodily harm constitute a forcible detainer, *a fortiori* where the party threatening has the means and manifests the disposition to carry them into immediate execution." <sup>484</sup>

A mere refusal to leave the premises after a demand, is not a forcible detainer.<sup>485</sup> "If a man, being in a house, refuse to open the door to one who comes to make an entry, this is no forcible detainer. So if A be in possession of a house, or have a lease thereof at the will of B, and B enters into the house and commands A to go out and leave him in possession, and A will not go out, this is not a forcible detainer." <sup>486</sup> Where one was in

<sup>481</sup> Pike v. Witt, 104 Mass. 595.

<sup>482</sup> Coughlin v. Rosen, 220 Mass. 220. A finding to that effect by a judge in an equity suit to prevent the landlord's interfering with the tenant's possession, is admissible in an action of tort for the assault. *Ibid*.

<sup>483</sup> Commonwealth v. Bigelow, 3 Pick. 31.

<sup>484</sup> Benedict v. Hart, 1 Cush. 487, 489, per Shaw, C. J.

<sup>485</sup> Saunders v. Robinson, 5 Met. 343; Commonwealth v. Dudley, 10 Mass. 403, 407; Larned v. Clarke, 8 Cush. 29; Kiernan v. Linnehan, 151 Mass. 543.

<sup>486</sup> Commonwealth v. Dudley, 10 Mass. 403, per Jackson, J.

unlawful possession of a farm lying partly in Massachusetts and partly in Connecticut, and the owner entered the Massachusetts portion and demanded possession of the whole, whereupon the other threatened him with personal violence from the Connecticut side, upon which the owner abandoned his demand, it was held that this was a forcible detainer of the Massachusetts part of the farm.<sup>487</sup>

§ 301. **What possession is necessary.**—The process cannot be invoked by one who has never been in possession of the land (see however the exception as to landlords below), though he may have a right of possession, and is thus distinguished from a writ of entry.<sup>488</sup>

“The language of the statute implies that no one is entitled to the remedy unless he has had possession of the premises; . . . We are of opinion that these statutes concerning forcible entry and detainer, were intended to furnish a summary redress to those persons, who, being in possession, are dispossessed either by a forcible entry or by a peaceable entry and a subsequent detainer, by force; and cannot extend to one who has never been in possession of the land but has merely a right of possession.”<sup>489</sup> A recent statute<sup>490</sup> provides that “A conveyance of land, if otherwise valid, shall, notwithstanding disseisin or adverse possession, be as effectual to transfer the title of the grantor as if he were actually seized and possessed of such land, and shall vest in the grantee the rights of entry and of action for the recovery of the estate incident to such title.” *Quære*, whether this act confers the right to maintain the process on the grantee of one who has not been in possession.

Where one had taken possession of an estate except the dwelling house thereon, and being on the premises, attempted

<sup>487</sup> *Benedict v. Hart*, 1 Cush. 487.

<sup>488</sup> *Boyle v. Boyle*, 121 Mass. 85 (case of a mortgagee who had never entered); *Woodside v. Ridgeway*, 126 Mass. 292 (case of lessee from a purchaser at a mortgagee's sale, neither the purchaser nor the mortgagee ever having been in possession).

*Cp.* *Williams v. McGaffigan*, 132 Mass. 122 (case of a grantee) holding that possession of the threshold of a house is not enough to entitle one to bring the action.

<sup>489</sup> *Boyle v. Boyle*, 121 Mass. 85, 86, Morton, J.

<sup>490</sup> G. L., c. 183, § 7; R. L., c. 127, § 6; St. 1891, c. 354, held constitutional in *McLoud v. Mackie*, 175 Mass. 355. *Cp.* *St. Patrick's, etc., Assoc. v. Hale*, 227 Mass. 175.

to take possession of the house and was forcibly resisted, it was held he might maintain the action, although his possession had been of only part of the estate.<sup>491</sup> A possession gained by force during the temporary absence and without the knowledge of the occupants is not sufficient unless continued after their return,<sup>492</sup> but, if it is so continued, the action may be maintained.<sup>493</sup>

§ 302. Summary process as between landlord and tenant.<sup>494</sup>—Right to maintain.<sup>495</sup>—“The statute therefore gives this summary process against one who is or has been a lessee, or who claims under a lessee in favor of the lessor or of anyone entitled to the immediate possession. This seems to extend to every species of lease or demise, whether for life (the lessee’s own, or *pur autre vie*), for years or at will, by lease or by parol; and to every species of lessee, assignee or subtenant;<sup>496</sup> and to every lessor, assignee of the lessor, or reversioner, whether by act of law or assignment *in pais*. And if by the determination of the term the reversion has merged in the fee, then the remedy is given to the owner in fee; who seems to be embraced in the description, ‘the person entitled to the premises,’ that is the

<sup>491</sup> Kinsley v. Ames, 2 Met. 29.

<sup>492</sup> Hodgkins v. Price, 132 Mass. 196.

<sup>493</sup> Lawton v. Savage, 136 Mass. 111. See also Mitchell v. Shanley, 12 Gray, 206; s. c., 15 Gray, 319.

<sup>494</sup> “As to the termination of a tenancy by notice to that effect or by notice to quit or by other methods, as a condition precedent to bringing this process to recover possession, see in the case of Leases, §§ 41, 112–151; in the case of Tenancies at Will, §§ 159–178; and as to Tenancies at Sufferance, §§ 180, 181, *supra*.

<sup>495</sup> See also the next section.

<sup>496</sup> Shaw, C. J., in Howard v. Merriam, 5 Cush. 563, 567; Lawton v. Savage, 136 Mass. 111 (tenant at will holding over after notice of lease); Kimball v. Rowland, 6 Gray, 224 (tenant at will after fourteen days’ notice to quit for non-payment of rent); Borden v. Sackett, 113 Mass. 214 (same); Hart v. Bouton, 152 Mass. 440 (assignee of tenant at will after three days’ notice); Proctor v. Moran, 213 Mass. 405 (lease after notice to quit).

*Historical.* St. 1825, c. 89, did not limit the right to bring this action to those holding under a lease or demise, but all persons holding real estate could maintain the action. Sackett v. Wheaton, 17 Pick. 103. The Revised Statutes narrowed this right to landlords and tenants. Cp. St. 1851, c. 233, §§ 76–95; St. 1852, c. 312, § 86. And see generally for the history of the action, Howard v. Merriam, 5 Cush. 563; Page v. Dwight, 170 Mass. 29.

possession of the premises, after the determination of the lease." <sup>497</sup>

Occupation of land by a tenant at will is not such a disseisin or adverse occupation as requires an entry by the grantee or lessee of the premises before commencing the process.<sup>498</sup> And where the defendant entered and continued to hold as tenant, not renouncing his landlord's title, he cannot acquire title by adverse possession.<sup>499</sup>

A lessee under an undisclosed written lease, entered into a partnership and rent was paid to the owner out of the partnership funds; his copartner bought out the lessee and succeeded to the possession of the premises, and in turn sold the business and transferred the possession to his wife; the lessee paid the next instalment to the owner, and gave the wife notice to quit. It was held in an action brought subsequently that the plaintiff was the "person entitled to the premises," and that the defendant was a person "holding under a lessee."<sup>500</sup> *Quære*, whether the grantee of land may bring this process though not owning the house occupied by the tenant which is on the land.<sup>501</sup>

But, where there is no evidence of a forcible entry or detainer, the process can only be invoked where the relation of landlord and tenant exists between the parties or their privies at the time the action is brought.<sup>502</sup> "To warrant such a proceeding and sustain a complaint . . . the defendant must have stood in the relation of a lessee of the premises, the possession of which is sought to be recovered, under either a written or parol lease, or that of a person holding under such lessee, who shall hold the

<sup>497</sup> Shaw, C. J., in *Howard v. Merriam*, 5 Cush 563, 567; *Hollis v. Pool*, 3 Met. 350; *Hildreth v. Conant*, 10 Met. 298, 302; *Rooney v. Keenan*, 6 Allen, 74, 75; *Hayden v. Ahearn*, 9 Gray, 438; *Kinsley v. Ames*, 2 Met. 29; *Green v. Tourtellott*, 11 Cush. 227; *Marsters v. Cling*, 163 Mass. 477 (lessee of purchaser at an execution sale *v.* tenant at will of original owner).

<sup>498</sup> *Alexander v. Carew*, 13 Allen, 70.

<sup>499</sup> *Curtis v. Goodwin*, 232 Mass. 538.

<sup>500</sup> *Hart v. Bouton*, 152 Mass. 440.

<sup>501</sup> See *Hayden v. Ahearn*, 9 Gray, 438, where however the point was not decided.

<sup>502</sup> *Howard v. Merriam*, 5 Cush. 563, 583; *Whitney v. Dart*, 117 Mass. 153. See *Woodside v. Ridgeway*, 126 Mass. 292; *Dakin v. Allen*, 8 Cush. 33; *Currier v. Jordan*, 117 Mass. 260. See also *Murray v. Riley*, 140 Mass. 490; *Marsters v. Cling*, 163 Mass. 477.

As to when the relation exists, see *supra*, §§ 1-9, 152-157, 179.

demised premises without right after the determination of the lease either by its own limitation or by notice to quit.”<sup>503</sup>

The process cannot be invoked by one who has gained a temporary possession by unlawful force.<sup>504</sup> So also, where “the respondent has never been the lessee of the complainant, or of any one through whom plaintiff claims a title by deed, lease, levy of execution, or any other mode of transfer,” the action cannot be maintained.<sup>505</sup> “While the process is not limited to the lessor alone, but may be maintained by an alienee to whom the lessor has since the demise conveyed his estate, it proceeds always upon the ground that the defendant has obtained his possession from some one with whom the plaintiff is in privity.”<sup>506</sup>

The process may also be brought against tenants at sufferance, who hold unlawfully by force.<sup>507</sup> Thus, it has been held that one who has been put in possession of the premises by the agent of the owner, though secretly and under an invalid lease for years might maintain the process against a former tenant at will who had become a tenant at sufferance, but who had managed to regain possession of the premises.<sup>508</sup> Where the owner conveyed away his estate and his tenant at will continued in possession, paying rent to the grantee, and after conveyance to a second grantee still remained in possession, it was held that the second grantee might maintain this process against such tenant.<sup>509</sup>

We have seen above<sup>510</sup> that a mortgagor in possession is not a tenant to the mortgagee; and where a mortgagee recovered a judgment and on *habere facias* received seizin and possession of the premises, but allowed the mortgagor to remain in occupation, it was held at common law that a lessee from the mortgagee could not maintain summary process against the mort-

<sup>503</sup> Shaw, C. J., in *Howard v. Merriam*, 5 Cush. 563, 583; *Hinckley v. Guyon*, 172 Mass. 414.

<sup>504</sup> *Hodgkins v. Price*, 132 Mass. 196; *Lawton v. Savage*, 136 Mass. 111; *Page v. Dwight*, 170 Mass. 29. See *supra*, § 298.

<sup>505</sup> *Green v. Tourtellott*, 11 Cush. 227, 230, per Dewey, J.; *Hinckley v. Guyon*, 172 Mass. 414.

<sup>506</sup> *Whitney v. Dart*, 117 Mass. 153, Devens, J.

<sup>507</sup> *Kinsley v. Ames*, 2 Met. 29; *Hollis v. Pool*, 3 Met. 350.

<sup>508</sup> *Walker v. Sharpe*, 14 Allen, 43.

<sup>509</sup> *Hayden v. Ahearn*, 9 Gray, 438.

<sup>510</sup> *Supra*, § 5.

gagor.<sup>511</sup> A mortgagor not in possession and not entitled to possession has, on the other hand, no right to the process as against the tenant of a mortgagee or assignee of the mortgage.<sup>512</sup> The statute now covers the case of mortgagees by a special provision, as we have seen above,<sup>513</sup> but it is still true that one who enters under a bond for a deed from the grantor, where the condition of the bond has not been performed, is not liable to this process under this section.<sup>514</sup> Probably such a relation between the parties does not prevent an action on the other branch of the statute, where there has been a forcible entry or detainer.<sup>515</sup>

Similarly, an occupier under an oral agreement of purchase, who subsequently refuses to pay instalments of purchase money until a warranty deed is given to him, and remains in occupation after a written lease of the premises has been given by the owner to a third person, is not a "lessee" within this section and not subject to this process.<sup>516</sup> Where a deed is given to a third person by the landlord of a tenant at will, the purchaser may maintain this process, although, in a bond for a deed previously given to the tenant by the landlord, the latter agreed that when a certain sum should have been paid he would stop charging rent, but would instead charge interest upon the sum remaining unpaid, and although before the delivery of the deed this sum had been paid or tendered.<sup>517</sup> So, the process may be used by a

<sup>511</sup> *Larned v. Clarke*, 8 Cush. 29; *Gerrish v. Mason*, 4 Gray, 432; *Hastings v. Pratt*, 8 Cush. 121, 123.

<sup>512</sup> *Chamberlin v. Perry*, 138 Mass. 546.

<sup>513</sup> Section 297. See *Warren v. James*, 130 Mass. 540; *Lowe v. Moore*, 134 Mass. 259; *Boyle v. Boyle*, 121 Mass. 85; *Woodside v. Ridgeway*, 126 Mass. 292; *Walker v. Thayer*, 113 Mass. 36, 39; *North Brookfield Bank v. Flanders*, 161 Mass. 335; *Allen v. Chapman*, 168 Mass. 442; *Page v. Dwight*, 170 Mass. 29. *Cp.* G. L., c. 239, §§ 2-6; R. L., c. 181, §§ 1, 7; Pub. St., c. 175, §§ 1, 7; St. 1879, c. 237.

<sup>514</sup> *Dakin v. Allen*, 8 Cush. 33; *Lyon v. Cunningham*, 136 Mass. 532, 538.

<sup>515</sup> See Crocker's Notes on Rev. Laws, 779, citing *Presbrey v. Presbrey*, 13 Allen, 281, 284; *Kinsley v. Ames*, 2 Met. 29; *Howard v. Howard*, 3 Met. 548. See also *Walker v. Thayer*, 113 Mass. 36, 39; *Larned v. Clarke*, 8 Cush. 29; *Hastings v. Pratt*, 8 Cush. 121; *Dunham v. Townsend*, 110 Mass. 440; *Gerrish v. Mason*, 4 Gray, 432; *Kiernan v. Linnehan*, 151 Mass. 543; *Hart v. Bouton*, 152 Mass. 440.

<sup>516</sup> *Kiernan v. Linnehan*, 151 Mass. 543.

<sup>517</sup> *Rooney v. Gillespie*, 6 Allen, 74.

lessee against a grantee from the lessor, the latter having reserved a life estate to himself.<sup>518</sup>

The process may be used where the tenancy of a lessee has been terminated by entry for breach of condition,<sup>519</sup> or through a taking by eminent domain.<sup>520</sup>

Where the defendant agrees instead of paying rent to perform certain services, the plaintiff cannot resort to this process on failure to perform the services without giving notice to quit, as in other cases.<sup>521</sup> The landlord cannot, after producing a written lease, and failing to prove the formal execution of it, rely upon parol proof of possession and a payment of rent to lay a foundation for this process; "for the law implies no contract where the parties have made an express one; and the party, after such offer of an express contract and failure to prove it, is estopped from denying the existence of such a written contract."<sup>522</sup> "Although this writ is used and the process is frequently called a process of forcible entry and detainer, yet it is not strictly a process of forcible entry and detainer, but it is given as a remedy to a landlord whose tenant holds without right, whether by force or not; but in such case it is always limited to the case of a tenant, for the tenancy having been proved, the title of the landlord could not be brought in question, and the only issue which could be tried is whether the rights of the tenant under his lease had expired."<sup>523</sup>

"A landlord may safely regain possession by force if he use no more than is necessary, and will incur no more liability to the statute process than to an action of trespass *quare clausum* or for assault."<sup>524</sup>

<sup>518</sup> Gloyd v. Davis, 214 Mass. 238.

<sup>519</sup> Whitwell v. Harris, 106 Mass. 532 (covenant against alterations or additions). Cp. Wheeler v. Dascomb, 3 Cush. 287; Shumway v. Collins, 6 Gray, 229.

*Historical.* The action was limited under the Revised Statutes to cases where a lease determined "by its own limitation or by a notice to quit," the expression "or otherwise" having been added in the General Statutes of 1860. Fifty Associates v. Howland, 11 Met. 99, 101.

<sup>520</sup> Boston v. Talbot, 206 Mass. 82, 92.

<sup>521</sup> Gleason v. Gleason, 8 Cush. 32.

<sup>522</sup> Barry v. Ryan, 4 Gray, 523, per Shaw, C. J.

<sup>523</sup> Lord, J., in Hodgkins v. Price, 132 Mass. 196, 199.

<sup>524</sup> Joseph Willard, 4 Am. Law Rev. 429, 449.



§ 303. **Defences.**—The fact that the estate of the plaintiff has determined during the action is no defence in this process; and, in such case, the plaintiff is entitled to a judgment for costs and for the payment of rent up to the time his estate terminated.<sup>525</sup> Thus, where both the plaintiff and defendant were in joint occupation, each claiming as tenant at will of the owner, but the plaintiff later secured a written lease, it was held that the tenancy at sufferance thus created was sufficient foundation for the action.<sup>526</sup> So also, the fact that a superior landlord has entered upon the plaintiff pending the action, is no defence.<sup>527</sup> Such an entry may, however, affect the amount of the plaintiff's recovery on the defendant's recognizance, as the amount will be limited to the time of such entry.<sup>528</sup>

If the defendant has never been tenant of the plaintiff, or if, having been a tenant of the plaintiff, he has been dispossessed by a title paramount, and has remained thereafter in possession under such new title, the action cannot be maintained.<sup>529</sup>

The covenant not to underlet by the lessee is no defence to an action by this process brought by one holding an assignment of the lease from the lessee's voluntary assignee in insolvency.<sup>530</sup> Nor is the action defeated by the fact that the plaintiff previously brought actions for use and occupation of the premises and recovered against the present defendant, nor by the full payment of all past rents.<sup>531</sup>

Nor, where the action is by a second lessee against a first lessee, is the action defeated by the fact that after the second lease the first lessee paid the sums for default of which his estate was terminated.<sup>532</sup>

<sup>525</sup> *Coburn v. Palmer*, 8 Cush. 124 (where one of two plaintiffs transferred his interest to the other); *Blish v. Harlow*, 15 Gray, 316; *King v. Lawson*, 98 Mass. 309 (where plaintiff's estate had expired by its own limitation); *Casey v. King*, 98 Mass. 503 (same); *Hooton v. Holt*, 139 Mass. 54 (where a mortgagee had foreclosed and the purchaser had brought an action against the tenant, which was pending).

<sup>526</sup> *Casey v. King*, 98 Mass. 503.

<sup>527</sup> *Coburn v. Palmer*, 8 Cush. 124.

<sup>528</sup> *Ibid.*

<sup>529</sup> *Hinckley v. Guyon*, 172 Mass. 412.

<sup>530</sup> *Bemis v. Wilder*, 100 Mass. 446.

<sup>531</sup> *Blish v. Harlow*, 15 Gray, 316.

<sup>532</sup> *McNamara v. Dorey*, 219 Mass. 151.



The plaintiff is not bound to show that the defendant has continued in possession of the premises up to the time of trial. The process can be maintained upon proof that the defendant was in possession without right when the suit was brought. Therefore, a plea that the respondent "is not in possession of the demanded premises" is bad on general demurrer, and the plaintiff is entitled to judgment on the merits.<sup>533</sup> "It did not amount to a plea of non-tenure at the time the complaint was filed and notice served, nor to a disclaimer. It was not a plea of the general issue and did not answer the complaint."<sup>534</sup> And the fact that pending the summary process, the plaintiff has taken possession of the demanded premises does not abate the action; but the plaintiff is entitled to judgment for costs and for rent and damages under the bond entered into by the defendant.<sup>535</sup> Furthermore, at least formerly, if the defendant does not take advantage, at the time of entering his appeal, by way of plea *puis darrein continuance*, the plaintiff may have judgment for possession also.<sup>536</sup> So, if a defendant appeals, and, before entering his appeal, voluntarily yields possession and the plaintiff enters, the defendant's entry of the appeal will not prevent the plaintiff taking judgment by default, where the defendant has not pleaded on appeal the fact of the plaintiff's possession.<sup>537</sup>

In *Coburn v. Palmer*,<sup>538</sup> where after action brought, one plaintiff transferred his interest to another, it appears from the record of the case that the judgment was for possession as well as costs. But in *Casey v. King*,<sup>539</sup> where the leasehold interest of the plaintiff expired pending the action, and he thereupon secured a new lease and brought a second action. it

<sup>533</sup> *Lewis v. Jackson*, 165 Mass. 481; *Hebron Church v. Adams*, 121 Mass. 257.

<sup>534</sup> *Davis v. Alden*, 12 Cush. 323.

<sup>535</sup> *Hebron Church v. Adams*, 121 Mass. 257; *Crosby v. Wentworth*, 7 Met. 10; *Hayden v. Ahearn*, 9 Gray, 438. *Cp.* *Weston v. Spiller*, 2 Allen, 125; *Gerrish v. Gary*, 1 Allen, 213; *Walcutt v. Spencer*, 14 Mass. 409 (cases of writs of entry).

<sup>536</sup> *Crosby v. Wentworth*, 7 Met. 10; *Hayden v. Ahearn*, 9 Gray, 438. *Cp.* *Coburn v. Palmer*, 8 Cush. 124, 126.

<sup>537</sup> *Crosby v. Wentworth*, 7 Met. 10.

<sup>538</sup> 8 Cush. 124.

<sup>539</sup> 98 Mass. 503.

was held that he should recover costs in the first action and possession in the second action. The court said, per Foster, J., that the second action "was resorted to because no judgment for possession could be obtained in the first action after the termination of the first lease."

Mr. Crocker<sup>540</sup> suggests that, following the analogy to the practice in writs of entry, it might be proper to enter judgment for the plaintiff for possession as well as for costs.

In this process, the defendant is estopped to deny the plaintiff's rule, if he in fact occupied under him,<sup>541</sup> therefore the defendant cannot offer evidence that the title of the plaintiff's lessor is defective. Such evidence is irrelevant.<sup>542</sup> So, the tenant cannot set up the fact that another has entered and that he has attorned to such person, when in fact the title of such person is not good against the plaintiff;<sup>543</sup> and, if the defendant seeks to justify his possession under the authority of some person other than the plaintiff, the burden is on him to prove the title of such person.<sup>544</sup>

A discharge under the U. S. Bankruptcy Act of 1841 has been held not to apply to summary process, but only to actions for the recovery of debts.<sup>545</sup>

Under an answer of general denial to an action based on a claim under a written lease, evidence that the question of the plaintiff's right to possession was orally submitted to arbitration, and that an oral award had been made against him, is inadmissible.<sup>546</sup> A plea in bar is not maintained by evidence of a judgment for the defendant in a prior process, even though no notice to quit or other notice was given to the defendant

<sup>540</sup> Notes on the Revised Laws, 781.

<sup>541</sup> *Gage v. Campbell*, 131 Mass. 566; *Coburn v. Palmer*, 8 Cush. 124; *Oakes v. Munroe*, 8 Cush. 282; *Miller v. Lang*, 99 Mass. 13; *Granger v. Parker*, 137 Mass. 228. *Cp.* *Cobb v. Arnold*, 9 Met. 398; *Chamberlin v. Perry*, 138 Mass. 546, 549. *Cp.* as to writs of entry, *Towne v. Butterfield*, 97 Mass. 105.

<sup>542</sup> *Gage v. Campbell*, 131 Mass. 566.

<sup>543</sup> *Baker v. Gavitt*, 128 Mass. 93. In this case, after breach of condition in a mortgage, the mortgagor paid the sum due, but the mortgagee afterward entered to foreclose, notifying the tenant to pay rent only to him.

<sup>544</sup> *Hogan v. Harley*, 8 Allen, 525.

<sup>545</sup> *Crosby v. Wentworth*, 7 Met. 10.

<sup>546</sup> *Pike v. Witt*, 104 Mass. 595.

between the termination of the first action and the commencement of the second.<sup>547</sup> Nor by the pendency of a prior action appealed to the superior court and not decided at the time of the trial of the second action, as the issues might not be decided the same way.<sup>548</sup> So the right of a landlord, on the expiration of a notice to quit for non-payment of rent, to commence this process, is not barred by a payment of rent after such notice and before proceedings are begun, if the landlord, when receiving payment, expressly reserves his rights under the notice.<sup>549</sup> Nor, in such an action, is it any defence that the landlord was indebted to the tenant in a greater sum than the amount of rent due.<sup>550</sup> Where the estate of a tenant at will has been terminated by a conveyance of the premises and the tenant has notice thereof, the grantee is not estopped to commence this process by the fact that he has previously served notices on the tenant to quit for breach of covenant and for non-payment of rent.<sup>551</sup> "Those notices granted no estate to the defendant; they did not mislead him or induce him in any way to alter his condition. The defendant did nothing under or by reason of them. They only tend to show that the plaintiff for a time mistook his rights, but do not prevent his asserting them afterward when discovered." <sup>552</sup>

It is competent for a defendant, under an answer denying that he holds wrongfully or against the right of the plaintiff, to introduce evidence that he has been in adverse possession for a period of three years.<sup>553</sup> "Such a defence is good under such general issue unless a more specific bill of particulars is called for;" <sup>554</sup> but a plea that the respondent is "not in possession of the premises demanded" is bad on demurrer, and the complainant is entitled to judgment on the merits.<sup>555</sup> "It did not amount to a plea of non-tenure at the time the complaint was filed, and notice served, nor to a disclaimer.

<sup>547</sup> *Thayer v. Carew*, 13 Allen, 82.

<sup>548</sup> *Proctor v. Moran*, 213 Mass. 405.

<sup>549</sup> *Kimball v. Rowland*, 6 Gray, 224.

<sup>550</sup> *Borden v. Sackett*, 113 Mass. 214.

<sup>551</sup> *Melley v. Casey*, 99 Mass. 241.

<sup>552</sup> *Ibid.*

<sup>553</sup> *Mitchell v. Shanley*, 12 Gray, 206.

<sup>554</sup> *Ibid.*, per Shaw, C. J.

<sup>555</sup> *Davis v. Alden*, 12 Cush. 323.

It was not a plea of the general issue and did not answer the complaint.”<sup>556</sup>

The process, of course, cannot be maintained though there has been a notice given by the tenant to quit, if that notice has been waived;<sup>557</sup> but, where it is brought against a tenant at sufferance, after notice to quit but without allowing sufficient time to remove, that does not make the notice incompetent in evidence, but is a matter of defence to the action.<sup>558</sup> Where the plaintiff and the defendant's lessor were tenants in common, and the plaintiff notified the defendant to quit the whole estate, the action cannot be maintained.<sup>559</sup>

A covenant to renew a lease upon notice, where the notice has been duly given, operates as an equitable defence, although no new lease has been actually executed.<sup>560</sup> In such a case, the tenant would be entitled to an injunction in a separate action.<sup>561</sup>

§ 304. **Survival of action.**—It is provided by statute that, “If, in a real or mixed action, the demandant dies before final judgment, his heir or devisee of the land demanded or of the right of action may, within such time as the court allows, appear and prosecute the action in the same manner as if commenced by him. If the first estate in possession under a devise is not a fee simple, the devisee of the first freehold estate in possession may appear and prosecute, and the judgment, if in his favor, shall be conformed to his title.”<sup>562</sup> Whether summary process is a real or mixed action under this provision, *quære*. Under the original act,<sup>563</sup> a grantee of a devise of the plaintiff was admitted to prosecute the action; but the language of the statute provided that, if a demandant should die, “his or her heir, or such other person as would, in case the action were abated, be entitled to com-

<sup>556</sup> *Davis v. Alden*, 12 Cush. 323.

<sup>557</sup> *Collins v. Canty*, 6 Cush. 415.

<sup>558</sup> *Hooton v. Holt*, 139 Mass. 54, per C. Allen, J.; *Lash v. Ames*, 171 Mass. 487. *Cp.* *Lewis v. Jackson*, 165 Mass. 481.

<sup>559</sup> *King v. Dickerman*, 11 Gray, 480. *Cp.* *Presbrey v. Presbrey*, 13 Allen, 281.

<sup>560</sup> *Ferguson v. Jackson*, 180 Mass. 557.

<sup>561</sup> *Ibid.*

<sup>562</sup> G. L., c. 228, § 8; R. L., c. 171, § 9; Pub. St., c. 165, § 14; Gen. St., c. 127, § 13; Rev. St., c. 93, § 14; St. 1826, c. 70.

<sup>563</sup> St. 1826, c. 70.

mence the like action," might be admitted to prosecute. The statute also applied to "all suits and actions for the recovery of lands, tenements, etc." <sup>564</sup> It is intimated in later cases, <sup>565</sup> that this process is not such a real or mixed action.

But it is clear that where the deceased demandant is a tenant at will, <sup>566</sup> or a tenant for life, <sup>567</sup> there is no right existing after his death upon which the statute can operate in favor of the heir or executor. "He [the plaintiff] may be an owner in fee, and then the right of possession follows the right of property, and descends with it to the heir, who may then come in and have judgment for the same interest which was claimed by the original complainant. Or he may be tenant for years, and so have a chattel interest in the term, which, with the right of possession, goes to the executor, and he may come in. But if his whole interest and title terminate with his own life, then no right is transmitted either to heir or executor, and neither can have judgment, and the suit stands abated." <sup>568</sup>

§ 305. Statutory procedure.—Commencement of process.—  
"Such person [entitled to the premises] may take from the superior court, or from a district court a writ in the form of an original summons, which shall summon the defendant to answer to the complaint of the plaintiff that the defendant is in possession of the land or tenements in question, describing them, which he holds unlawfully and against the right of the plaintiff; and no other declaration shall be required. The action shall be brought in the county and, if brought in a district court, in the judicial district, where the land or tenements lie." <sup>569</sup>

<sup>564</sup> *Sackett v. Wheaton*, 17 Pick. 103. Cp. St. 1825, c. 89, § 1.

<sup>565</sup> *Ferrin v. Kenney*, 10 Met. 294, 296, per Shaw, C. J.; *Martin v. Campbell*, 120 Mass. 129.

<sup>566</sup> *Ferrin v. Kenney*, 10 Met. 294.

<sup>567</sup> *Brown v. Kendall*, 13 Gray, 272.

<sup>568</sup> Shaw, C. J., in *Ferrin v. Kenney*, 10 Met. 294.

<sup>569</sup> G. L., c. 239, § 2; R. L., c. 181, § 2; Pub. St., c. 175, §§ 2, 3; Gen. St., c. 137, § 5, Rev. St., c. 104, §§ 4, 13; St. 1825, c. 89, § 1; St. 1841, c. 55, § 2. Cited in *Alexander v. Carew*, 13 Allen, 72; *Thayer v. Carew*, 13 Allen, 82; *O'Brien v. Ball*, 119 Mass. 28; *Martin v. Campbell*, 120 Mass. 126; *Baker v. Gavitt*, 128 Mass. 93; *Wilbur v. Wilbur*, 7 Met. 249; *Kinsley v. Ames*, 2 Met. 29; *Hollis v. Pool*, 3 Met. 350; *Howard v. Howard*, 3 Met. 555; *Crosby v. Wentworth*, 7 Met. 10; *Benedict v. Morse*, 10 Met. 230; *Ferrin v. Kenney*, 10 Met. 294; *Hildreth v. Conant*, 10 Met. 299; *Benedict v. Cut-*

"No different form of declaration is used in either of these three cases [forcible entry, forcible detainer, landlord and tenant process], the principal allegation being always that the defendant holds the premises unlawfully and against the right of the plaintiff."<sup>570</sup> Where the description of the premises sought to be recovered is otherwise sufficient, the fact that the street upon which they are situated is wrongly described in the writ is not fatal to the action.<sup>571</sup> The Superior Court may allow an amendment making a description of the premises complete and accurate, which was before imperfect and general.<sup>572</sup>

§ 306. **Jurisdiction.**—The jurisdiction of a magistrate is not ousted by the fact that some days before the action was begun the magistrate drew the lease under which the plaintiff claims possession, and a month before wrote a notice from the owner to the defendant to quit the premises; or by the fact that he was the only subscribing witness to the lease.<sup>573</sup>

§ 307. **Service of process.**—Constables who give a bond of one thousand dollars may serve any writ or other process under the provisions of this chapter.<sup>574</sup>

A court having jurisdiction may allow an officer to amend his return so as to show service on the defendant;<sup>575</sup> and, where the writ was served on the same day on which a notice to quit expired, the officer may testify, for the purpose of showing that the action was not prematurely brought, as to the precise hour of service.<sup>576</sup>

ting, 13 Met. 184; *Benedict v. Hart*, 1 Cush. 487; *Wheeler v. Dascomb*, 3 Cush. 287; *Howard v. Merriam*, 5 Cush. 563; *Collins v. Canty*, 6 Cush. 415; *Hastings v. Pratt*, 8 Cush. 122; *Coburn v. Palmer*, 8 Cush. 124; *Oakes v. Munroe*, 8 Cush. 282; *Davis v. Alden*, 12 Cush. 323; *Currier v. Barker*, 2 Gray, 224; *Shumway v. Collins*, 6 Gray, 229; *Johnson v. Stewart*, 11 Gray, 181; *King v. Dickerman*, 11 Gray, 481; *Mitchell v. Shanley*, 12 Gray, 206; *Braman v. Perry*, 12 Pick. 119; *Page v. Dwight*, 170 Mass. 37; *Hinckley v. Guyon*, 172 Mass. 412; *First Baptist Church v. Harper*, 191 Mass. 196.

<sup>570</sup> *Lawton v. Savage*, 136 Mass. 111, 113, Devens, J.

<sup>571</sup> *Pray v. Wasdell*, 146 Mass. 324.

<sup>572</sup> *Lewis v. Jackson*, 165 Mass. 485.

<sup>573</sup> *Cook v. Berth*, 102 Mass. 372.

<sup>574</sup> G. L., c. 41, § 92; R. L., c. 25, § 88; St. 1893, c. 423, § 27.

<sup>575</sup> *Johnson v. Stewart*, 11 Gray, 181. Cp. *Johnson v. Day*, 17 Pick. 106; *Baxter v. Rice*, 21 Pick. 197.

<sup>576</sup> *Wardell v. Etter*, 143 Mass. 19.

**§ 308. Hearing.**—Where the trial judge instructs the jury fully as to the methods of creation and proof of tenancy, and no exception is taken to his instructions, an exception to his refusal to rule as requested as to the tenancy cannot be sustained.<sup>577</sup>

If a wife is offered as a witness to prove a contract of lease, the decision of the judge as to whether the matter was transacted in her husband's absence, and whether therefore she was a competent witness, is not open to exceptions.<sup>578</sup>

**§ 309. Storage of property removed.**—“If an officer, serving an execution issued on a judgment for the plaintiff for the possession of land or tenements, removes personal property, which belongs to a person other than the plaintiff, from the land or tenements and places it upon the sidewalk, street or way on which the land or tenements abut, he may forthwith, and before the expiration of the time limited in any ordinance or by-law for the removal of obstructions in the street, remove such property and cause it to be stored for the benefit of the owners thereof. Whoever accepts the same on storage from such officer shall have a lien thereon for reasonable storage fees and for reasonable expenses of removing it to the place of storage, but such lien shall not be enforced by sale of the property until it has been kept on storage for at least six months. If the owner of such property is present and claims it when it is so removed from the land or tenements, the officer shall not remove and store it, and his act of placing it upon the sidewalk or street shall be deemed the act of the owner, who alone shall be held to answer therefor.”<sup>579</sup>

The lien may be dissolved by giving bond, and the person claiming the lien, must upon demand furnish the owner or person having an interest in the property with a statement of the amount claimed and of the reason why it is claimed.<sup>580</sup>

**§ 310. Appeal or removal.**—“If the defendant appeals from a judgment of a district court rendered for the plaintiff for the possession of the land or tenements demanded, he shall, except as provided in the following section, before such appeal is allowed, give a bond in such sum as the court orders, payable to the plaintiff, with sufficient surety or sureties approved by

<sup>577</sup> *Springall v. Whittier*, 103 Mass. 375.

<sup>578</sup> *O'Connor v. Hallinan*, 103 Mass. 547.

<sup>579</sup> G. L., c. 239, § 4; R. L., c. 181, § 4; St. 1899, c. 412, § 1.

<sup>580</sup> St. 1907, c. 440.



the plaintiff or court, conditioned to enter the action in the superior court for that county at the return day next after the appeal is taken, and to pay to the plaintiff, if final judgment is in his favor, all rent accrued at the date of the bond, all intervening rent, and all damage and loss which he may sustain by the withholding of possession of the land or tenements demanded and by reason of any injury done thereto during such withholding, with all costs, until the delivery of possession thereof to him. Upon final judgment for the plaintiff, all money then due to him may be recovered in an action on the bond.”<sup>581</sup>

Formerly, a recognizance might be given in place of a bond in certain cases.<sup>582</sup> Under the prior wording of the statute the following decisions were made: (1) Such a bond, if similar in its terms to the prescribed recognizance, if not within the statute, was valid at common law.<sup>583</sup> (2) Where a bond has been given in place of a recognizance and the appeal is entered and judgment given for the plaintiff, then exceptions taken are overruled and final judgment entered in the superior court for the plaintiff, the validity of such judgment cannot be questioned by the principal or sureties to the bond on the ground that a recognizance should have been given instead.<sup>584</sup> (3) If a bond, given in place of a recognizance and valid at common law, if not under the statute, provides for the entry of the appeal on the “first Monday of September

<sup>581</sup> G. L., c. 239, § 5; R. L., c. 181, § 6; Pub. St., c. 175, § 6 as amended by St. 1888, c. 325, St. 1885, c. 384, § 5; Gen. St., c. 137, § 9; Rev. St., c. 104, § 10; St. 1825, c. 89, § 2.

Cited in *Shaw v. McIntier*, 5 Allen, 424; *Weston v. Weston*, 102 Mass. 514; *Martin v. Campbell*, 120 Mass. 126; *Warner v. Howard*, 121 Mass. 82; *Melvin v. Bird*, 131 Mass. 561; *Bartholomew v. Chapin*, 10 Met. 2; *Davis v. Alden*, 2 Gray, 311; *Jackson v. Richards*, 16 Gray, 497; *Braman v. Perry*, 12 Pick. 119; *Parker v. Mabee*, 176 Mass. 236; *Snow v. Dye*, 178 Mass. 396; *Curtiss v. Curtiss*, 182 Mass. 104; *Proctor v. Moran*, 213 Mass. 407.

<sup>582</sup> Pub. St., c. 175, § 6.

Under St. 1825, c. 89, § 2, the recognizance had to be “in such reasonable sum as the court shall order,” but under the Rev. St., and the Gen. St. in which these words are omitted, the recognizance must be in a specific sum. *Warner v. Howard*, 121 Mass. 82.

For the form of a recognizance under former statutes, see *Martin v. Campbell*, 120 Mass. 126.

<sup>583</sup> *Pray v. Wadell*, 146 Mass. 324; *Granger v. Parker*, 142 Mass. 186.

<sup>584</sup> *Granger v. Parker*, 142 Mass. 186; *Pray v. Wadell*, 146 Mass. 324.



next," and, although it is dated Aug. 13, and recites proceedings as having occurred on Aug. 16, is not filed and approved until Sept. 1, which is Monday, that is the day for such entry, and the date of the bond, not being misleading, will not affect its validity.<sup>585</sup> (4) A description in a recognizance of the original case as a "personal action" in which the plaintiff recovered judgment for the possession of a piece of land, is sufficient to show that the case was brought under the statute.<sup>586</sup> (5) A certificate of the fact of recognizance made by the magistrate and sent with the papers of the case to the appellate court operates as a return of the recognizance to that court; and an attestation on such a paper to the effect that it is "a true copy" may be rejected as surplusage.<sup>587</sup> (6) When upon appeal the proper papers have been filed and judgment affirmed upon failure of the conusor to enter his appeal, no further judgment of forfeiture or order that the recognizance be estreated is necessary to enable the conusee to enforce it.<sup>588</sup> (7) A recognizance may be valid, although the language of its condition varies from the language of the statute, in immaterial particulars, and although it omits to require all that the statute authorizes. Thus a recognizance which does not require payment of "loss which the plaintiff may sustain by reason of withholding the possession of the premises, etc.," is sufficient, and the omission being in the defendant's favor he cannot object to it.<sup>589</sup> (8) In an action on the recognizance the court said: "In ordinary cases, founded on a general statute, it is not necessary to cite the statute or to refer to it in terms; it is sufficient to state such facts and such a case as falls clearly under the statute. But *a fortiori* it is not necessary under this statute because the statute itself . . . prescribes a simple form of proceeding."<sup>590</sup> (9) The expression in a recognizance "and pay all rent due, and to become due," must be construed to mean intervening rent.<sup>591</sup> (10) Under a

<sup>585</sup> Pray v. Wasdell, 146 Mass. 324.

<sup>586</sup> Martin v. Campbell, 120 Mass. 126.

<sup>587</sup> *Ibid.*; Cp. Cook v. Berth, 108 Mass. 73; Benedict v. Cutting, 13 Met. 181.

<sup>588</sup> Martin v. Campbell, 120 Mass. 126.

<sup>589</sup> Shaw v. McIntier, 5 Allen, 423. See also Martin v. Campbell, 120 Mass. 126; Pray v. Wasdell, 146 Mass. 324.

<sup>590</sup> Benedict v. Cutting, 13 Met. 181.

<sup>591</sup> Martin v. Campbell, 120 Mass. 126.

*Historical.* "Intervening rent and damages" in the Rev. St. included

declaration alleging that the defendant has not paid rent due and in arrear, and all intervening rent, damages and costs, the plaintiff may, if the defendant does not demur or move for a more particular statement, recover the full value of the rent, though increased since the commencement of the suit.<sup>592</sup>

Rent accrued or injury done to the premises after the filing of the complaint cannot be recovered for by the complainant upon a default in the appellate court, but the only remedy therefor is by action upon the bond.<sup>593</sup>

Under the present wording of the statute, the respondent is liable to pay rent at the rate reserved in the lease, until the recovery of possession by the lessor, although the buildings on the premises be meanwhile destroyed by fire; and is responsible for all waste, actual and permissive, and for all losses, including the destruction of the building, if not proved to have been caused by inevitable accident.<sup>594</sup> An officer cannot include in his fees for serving an execution for the possession of land, a charge for "assistance" or for "extra time and trouble," nor, unless he makes the certificate prescribed by law, can he be allowed for the use of a horse and carriage.<sup>595</sup>

"An appeal from the clerk to the judge . . . in the matter of taxing costs after judgment, does not vacate the judgment as in the case of an appeal to a higher court from the judgment of a lower one, but if waived before hearing, leaves the judgment in force as of the day when it was entered. It is only in case the appeal from the taxation of costs is heard and determined by the judge that 'the judgment shall be considered as rendered on the day when the costs are finally taxed and allowed.' " <sup>596</sup> Neither a supposed assignment of a lease of the premises in question, nor an adjudication of insolvency of the defendant made before the date of judgment in the

nothing more than rent at the stipulated rate, and interest thereon. "If other damages, beyond rent at the rate stipulated by the parties, and interest thereon be claimed, the manner of enforcing such claims must be by instituting a writ of entry, which will open the inquiry in reference to damages in the fullest manner." *Bartholomew v. Chapin*, 10 Met. 2, Dewey, J. See, for older statutes, *Harrington v. Brown*, 7 Pick. 234.

<sup>592</sup> *Jackson v. Richards*, 16 Gray, 497.

<sup>593</sup> *Braman v. Perry*, 12 Pick. 119.

<sup>594</sup> *Davis v. Alden*, 2 Gray, 311.

<sup>595</sup> *Weston v. Weston*, 102 Mass. 514.

<sup>596</sup> *Melvin v. Bird*, 131 Mass. 561, per Gray, C. J.

summary process, and not pleaded in that action, can affect the validity of the judgment.<sup>597</sup>

Where a writ of restitution in a process of forcible entry has been executed, and the proceedings are afterwards quashed upon *certiorari*, the court has power to grant a writ of rerestitution.<sup>598</sup>

In a case where, under the former wording of the statute requiring a recognizance to be given, a bond was given instead and was executed by the attorney of the defendant, the point was taken by counsel that the bond must be executed by the defendant personally. This point was not decided, but must be considered doubtful.<sup>599</sup> St. 1893, c. 396, § 25,<sup>600</sup> provided that appeal bonds, except in this process, might be executed by the attorney of record; and in *Adams v. Robinson*<sup>601</sup> it was held that St. 1820, c. 79, § 4, providing that in certain appeals "the party appealing shall recognize with sufficient surety" was satisfied by a recognizance entered into by the attorney of the appealing party.

If the lease of premises expires pending a proceeding by the lessee against a sublessee, and the lessee takes a new lease, the covenant of the sublessee in his appeal bond to pay "rent due or to become due" covers rent due under the new lease as well as under the original lease.<sup>602</sup> Where a tenant, upon being notified to quit, exchanged rooms with another person living in the same house, the occupation of such person may be regarded as the occupation of the tenant for purposes of action on the appeal bond.<sup>603</sup>

Where a bond has been given and suit has been brought upon it, it is too late to claim that the plaintiff had no interest in the land, but acted as an agent in bringing the action.<sup>604</sup>

Apparently a judgment for possession and cost may be enforced by *scire facias* upon the appeal bond.<sup>605</sup>

<sup>597</sup> *Melvin v. Bird*, 131 Mass. 561, per Gray, C. J.

<sup>598</sup> *Commonwealth v. Bigelow*, 3 Pick. 31.

<sup>599</sup> *Granger v. Parker*, 142 Mass. 186.

<sup>600</sup> See G. L., c. 231, § 98; R. L., c. 173, § 98; Pub. St., c. 154, § 52.

<sup>601</sup> 1 Pick. 462.

<sup>602</sup> *Pray v. Wasdell*, 146 Mass. 324.

<sup>603</sup> *Ibid.*

<sup>604</sup> *Curtiss v. Curtiss*, 182 Mass. 104.

<sup>605</sup> Under Gen. St., c. 137, § 9, as amended by St. 1871, c. 315, § 2, the present arrangement of giving an appeal bond instead of a recognizance

§ 312.<sup>605a</sup> Judgment and execution.<sup>606</sup>—"If the court finds the plaintiff entitled to possession of the land or tenements, he shall have judgment and execution for the possession and for costs. If the plaintiff becomes nonsuit, or fails to prove his right to possession, the defendant shall have judgment and execution for costs."<sup>607</sup>

An officer having a writ of execution for the possession of property may remove furniture and goods of the tenant,<sup>608</sup> and also his family provided he use no unnecessary force against the latter.<sup>609</sup> But this right of removing persons is limited to the tenant, or those claiming under the tenant or intruders, and does not apply to persons claiming rightfully to be there.<sup>610</sup> He may break down the door without demanding admission, if he does not know or have reason to know that there are persons in the house, and the persons are there for the purpose of opposing him.<sup>611</sup> He may also forcibly expel any one entering the house after him without right.<sup>612</sup>

But the writ does not justify an officer who removes goods in violating a city ordinance against placing property upon was already authorized in the case of appeals from the Municipal Court of the city of Boston. Under these statutes it was held that *scire facias* could be brought upon the bond. *Melvin v. Bird*, 131 Mass. 561.

It is true that Gen. St., c. 137, § 9, expressly authorized the bringing of *scire facias* upon a recognizance, but Gray, C. J., said, p. 564: "It was in accordance with the general rules of pleading that such a recognizance should be enforced either by writ of *scire facias*, because it was matter of record in the appellate court, or by action of contract, because it was for a definite sum that might have been recovered by an action of debt at common law. *Bridge v. Ford*, 4 Mass. 641; *Curtice v. Bothamly*, 8 Allen, 336."

The court also mentions the analogy of such a bond to a bail bond in a civil action.

<sup>605a</sup> § 311 is omitted from this edition.

<sup>606</sup> See also *supra*, § 303.

<sup>607</sup> G. L., c. 239, § 3; R. L., c. 181, § 3; Pub. St., c. 175, § 5; Gen. St., c. 137, §§ 7, 8; Rev. St., c. 104, §§ 6, 7; St. 1825, c. 89, § 1. Cited in *Martin v. Campbell*, 120 Mass. 126; *Page v. Dwight*, 170 Mass. 29; *Edwards v. Columbia Amusement Co.*, 215 Mass. 127.

<sup>608</sup> *Commonwealth v. Lennon*, 172 Mass. 434.

<sup>609</sup> *Fiske v. Chamberlain*, 103 Mass. 495; *Howe v. Butterfield*, 4 Cush. 302.

<sup>610</sup> *Clark v. Parkinson*, 10 Allen, 133, 136.

<sup>611</sup> *Howe v. Butterfield*, 4 Cush. 302.

<sup>612</sup> *Ibid.*

the sidewalk "so as to obstruct a free passage for travellers for more than fifteen minutes," even though the sidewalk was not wholly obstructed and the officer had piled the goods as neatly and compactly as possible.<sup>613</sup> He may store the goods at the owner's cost.<sup>614</sup> In fact it is sometimes the practice for the plaintiff, where such an ordinance as the above mentioned is in force, to call the attention of the police to the fact that a removal of goods is to be made, in order that the police may notify the officer executing the writ not to leave the goods on the sidewalk, but remove them to a place of storage. It seems, however, that the officer would have the right to do this in any case.

An officer may, and usually does, demand a bond of indemnity for the execution of the writ.<sup>615</sup>

"The judgment in an action under this chapter shall not be a bar to any action thereafter brought by either party to recover the land or tenements in question, or to recover damages for any trespass thereon; but the amount recovered for rent under section five shall be deducted in any assessment of damages in such subsequent action by the original plaintiff."<sup>616</sup> But where an action in summary process has been decided against one who had brought a bill in equity to secure an injunction against interference with his possession, and who thereupon amends his bill by reciting these facts, the bill amounts in substance only to another action in summary process, and is not the kind of action contemplated by this section.<sup>617</sup>

This section furnishes additional evidence that the title is not to be brought in question in this action.<sup>618</sup>

## SECTION X

### LIENS <sup>619</sup>

§ 313. **Landlords have no lien.**—A landlord has no lien, in the absence of agreement, upon the goods and chattels left in

<sup>613</sup> *Commonwealth v. Lennon*, 172 Mass. 434.

<sup>614</sup> *Ibid.*

<sup>615</sup> *Clark v. Parkinson*, 10 Allen, 133; *Commonwealth v. Lennon*, 172 Mass. 434.

<sup>616</sup> G. L., c. 239, § 7; R. L., c. 181, § 9; Pub. St., c. 175, § 9; Gen. St., c. 137, § 11; Rev. St., c. 104, § 12. Cited in *Sargent v. Smith*, 12 Gray, 427; *Warren v. James*, 130 Mass. 541.

<sup>617</sup> *Edwards v. Columbia Amusement Co.*, 215 Mass. 125.

<sup>618</sup> *Warren v. James*, 130 Mass. 541.

<sup>619</sup> As to Mechanics' Liens, see *infra*, § 347.

his house by the outgoing tenant. He is entitled to a reasonable compensation for storage, but if he refuses to deliver the goods on demand he cannot claim storage thereafter, and having no lien he cannot refuse to deliver them when demanded.<sup>620</sup>

A provision in a lease that a landlord may re-enter upon the land if the rent is not paid and hold or sell the crops for his debt is in effect a lien, but until the lessor enters and takes possession, the lessee may sell the crops and his creditors may attach and levy executions upon them.<sup>621</sup>

A provision giving a lien upon property to be placed in a store after the delivery of the lease is void as against the trustee in bankruptcy of the lessee;<sup>622</sup> but, unless contrary to statute, it is valid as to property already upon the premises both as against the lessee and his trustee in bankruptcy.<sup>623</sup>

**§ 314. Lien of boarding house and lodging house keepers.—**

**In general.**—While not properly a part of the law of landlord and tenant strictly considered, it is frequently of practical importance to those renting rooms or lodgings to guests, transient or permanent, to know what are their remedies against the property of their guests, in case of the failure of the latter to pay the stipulated board or lodging.

“Boarding house or lodging house keepers shall have a lien on the baggage and effects brought to their houses and belonging to their guests, boarders or lodgers, except mariners, for all proper charges due for fare and board or lodging, which may be enforced as provided in sections twenty-six to thirty, inclusive.”<sup>624</sup>

**§ 315. How differing from an innkeeper's lien.**—“It is contended that the statute gives a boarding-house keeper the same lien that an innkeeper would have. If such had been the intent of the legislature, it would have been easy to express

<sup>620</sup> *Preston v. Neale*, 12 Gray, 222; *Field v. Roosa*, 159 Mass. 128; *Re Kelly*, 18 Fed. Rep. 528; *Re Eckroth*, Fed. Cas. No. 4265; *Grant v. Barnes*, 177 Mass. 111.

<sup>621</sup> *Butterfield v. Baker*, 5 Pick. 522; *Munsell v. Carew*, 2 Cush. 5. *Cp. Lewis v. Lyman*, 22 Pick. 437, 445.

<sup>622</sup> *Re Eckworth*, Fed. Cas. No. 4265.

<sup>623</sup> *Ibid.*; *McLean v. Klein*, 3 Dill. 113.

<sup>624</sup> G. L., c. 255, § 23; R. L., c. 198, § 28; Pub. St., c. 192, § 31, as amended by St. 1897, c. 292; Gen. St., 151, § 29; St. 1859, c. 229. Cited in *Bayley v. Merrill*, 10 Allen, 360; *Mills v. Shirley*, 110 Mass. 158; *Smith v. Colcord*, 115 Mass. 70.

it. But such intent is not expressed, and the lien of an inn-keeper who is obliged to provide for travellers, and is subject to peculiar responsibilities, may properly be in some respects more broad than that which the statute has conferred upon a boarding-house keeper." <sup>625</sup>

The lien attaches as and when the board is furnished, though under the contract nothing may be due until the end of a certain period.<sup>626</sup> "Otherwise a guest who had obtained credit upon the strength of the lien, might destroy the security of the boarding-house keeper by a sale or by removing the goods at any time before the bill for board became payable by the contract; a result which is inconsistent with the nature of the lien and which defeats the purpose of the statute." <sup>627</sup>

If the boarder sells the property to a third person, the lien continues in force for all sums due up to the time when the boarding-house keeper is notified of such sale, or the property is removed.<sup>628</sup> The court has said: "The defendant relies on the fact that, in the meantime, the boarder had sold the property, and had paid for his board in full up to the time of the sale. But the plaintiff had no notice of the sale; and we think that, within the meaning of the statute, she had a right to continue to furnish board, on the security of the lien, until such notice was given, if the property remained in the house. . . . The statute creates the pledge of the property when the owner brings it, for whatever may be due while he stays." <sup>629</sup> The fact that the wife and child of a person go to a boarding-house, taking his goods with them, under circumstances which enable them to carry his credit with them, gives no lien on such goods to the boarding-house keeper. The latter's remedy is only an action of contract.<sup>630</sup>

§ 316. **Enforcement of lien.**—[If the] "money is not paid, within sixty days, after a demand in writing delivered to the debtor or left at his usual place of abode, if within the commonwealth, or mailed postpaid to him at his usual place of abode without the commonwealth, [the boarding-house or lodging-house keeper] may file a petition in the superior court or in a

<sup>625</sup> Per Chapman, C. J., in *Mills v. Shirley*, 110 Mass. 158.

<sup>626</sup> *Smith v. Colcord*, 115 Mass. 70.

<sup>627</sup> *Ibid.*, per Morton, J.

<sup>628</sup> *Bayley v. Merrill*, 10 Allen, 360.

<sup>629</sup> *Ibid.*, per Hoar, J.

<sup>630</sup> *Mills v. Shirley*, 110 Mass. 158.



district court within the jurisdiction of which the petitioner resides or has his usual place of business, for an order for the sale of the property in satisfaction of the debt.”<sup>631</sup> Such a notice should, it seems, be signed with the name of the boarding-house or lodging-house keeper, but not necessarily in his own handwriting.<sup>632</sup>

“The court shall thereupon issue a notice to the owner of the property to appear at a time and place designated, which shall be served by an officer qualified to serve civil process or by a disinterested person by delivering to the owner or by leaving at his usual place of abode, if within the commonwealth, a copy thereof fourteen days before the hearing. The return, if not made by an officer, shall be on oath.”<sup>633</sup> “Owner in this section does not mean technical owner but the person in possession and control of the goods. This section provides for notice to the ‘owner’ of the goods, and her [the plaintiff’s] contention is that although her husband stored his and her goods in his name with her full knowledge and approval, still, as she was the owner of some of the goods, she was entitled to notice. We are of the opinion that this contention is not tenable.”<sup>634</sup>

“If the owner or his usual place of abode is unknown, the petition may be filed sixty days after the money becomes due, and the notice describing the property may be issued ‘to the unknown owner,’ or to the owner, naming him, ‘whose usual place of abode is unknown.’ If the owner resides out of the commonwealth or he or his usual place of abode is unknown, notice may be given by a publication as provided in section five [at least once in each of three successive weeks in one of the principal newspapers, if any, published in the town where the mortgage is properly recorded or where the property is situated; otherwise, in one of the principal newspapers published in the county.]”<sup>635</sup>

<sup>631</sup> G. L., c. 255, § 26; R. L., c. 198, § 23; Pub. St., c. 192, § 24; Gen. St., c. 151, § 21. Cited in *Busfield v. Wheeler*, 14 Allen, 139; *Finnegan v. Lucy*, 157 Mass. 443; *Keith v. Maguire*, 170 Mass. 212. *Cp.* *Tobin v. Taintor*, 229 Mass. 174.

<sup>632</sup> *Finnegan v. Lucy*, 157 Mass. 439, 443.

<sup>633</sup> G. L., c. 255, § 27; R. L., c. 198, § 24; Pub. St., c. 192, § 25; Gen. St., c. 151, § 22. Cited in *Keith v. Maguire*, 170 Mass. 210.

<sup>634</sup> *Keith v. Maguire*, 170 Mass. 210, 212, per Lathrop, J.

<sup>635</sup> G. L., c. 255, § 28; R. L., c. 198, § 25; St. 1893, c. 173; Pub. St., c. 192, § 26; Gen. St., c. 151, §§ 23, 24.



"If, upon default or a hearing, it is found that a lien exists upon the property and that the property ought to be sold for the satisfaction of the debt, the court may make an order for such sale, determine and record the amount then due and award costs to the prevailing party. Any proceeds of the sale remaining after satisfying the debt, costs and charges, shall be paid to the owner upon demand." <sup>636</sup>

"A party may appeal from the final order of a district court, as in other civil actions, to the superior court, which shall make an appropriate order. If the respondent appeals, he shall give bond for the prosecution of his appeal and for the payment, if judgment is rendered against him, of any balance of the debt, with costs, which may remain unsatisfied after a sale of the property." <sup>637</sup>

§ 317. Dissolution of lien.—"A person who owns or has an interest in any personal property upon which such a lien has been claimed may, at any time after a petition is brought for its enforcement and before the property is lawfully sold to satisfy said lien, dissolve the lien upon his interest in the whole or any part of said property by giving bond to the person claiming the lien, with sufficient sureties, who shall be approved in writing by the claimant or by his attorney, or by a justice of a district court or master in chancery, conditioned to pay to such person within thirty days after the final judgment or order of sale of said property or the interest therein or part thereof for which said bond may be given, an amount fixed as the value of said interest or such part thereof as may be necessary to satisfy the amount for which said interest or part thereof may be subject to said lien. The property upon which the lien is to be dissolved shall be described in the bond. If the parties do not agree as to the value of the property or of the part to be released from said lien, the value may be determined in accordance with the provisions of sections one hundred and twenty-five and one hundred and twenty-six of chapter two hundred and twenty-three. If the said property, or the part to be released from said lien, consists of books, papers, documents or other similar property and the parties do not agree upon the amount for which said bond shall be given, it may be fixed in like manner at such

<sup>636</sup> G. L., c. 255, § 29; R. L., c. 198, § 26; Pub. St., c. 192, §§ 27, 28, 30; Gen. St., c. 151, §§ 25, 26, 28.

<sup>637</sup> G. L., c. 255, § 30; R. L., c. 198, § 27; Pub. St., c. 192, § 29; Gen. St., c. 151, § 27.

amount as may be reasonable, giving due consideration to the amount for which said lien is claimed, and upon the delivery of the bond in accordance with the provisions hereof the lien upon the property described therein shall be dissolved. The person claiming a lien upon said personal property shall, upon demand therefor, furnish the person owning or having an interest in said property with a statement of the amount and reasons, or other considerations, for which the lien is claimed.”<sup>638</sup>

§ 318. **Innkeepers’ lien.**—An innkeeper differs from a boarding-house or lodging-house keeper in that, being obliged to receive guests, he has always had a lien on property brought by them to his house, even when belonging to third persons.<sup>639</sup>

Frequently, the same person is both an innkeeper and a boarding-house keeper. In such a case, the true relation of the parties is a question of fact for the jury.<sup>640</sup> “It was a question of fact to be decided upon all the evidence whether the plaintiff sustained the relation of guest or boarder in the defendant’s inn at the time of the loss of the articles sued for . . . its correct decision requires a consideration of the situation of the parties and all the circumstances. If the defendant was only an innkeeper, the presumption would be that a temporary sojourner, in the absence of other proof, must be a guest. Where in the same house he carries on the business of innkeeper and keeper of boarders, it is more difficult. The more prominent occupation would perhaps control in a case where there was no other evidence. The

<sup>638</sup> G. L., c. 255, § 33.

<sup>639</sup> See on this subject Jones on Liens (2d ed., 1894), §§ 498 ff. See generally as to the rights and liabilities of innkeepers in this commonwealth: G. L., c. 140, §§ 1-21; R. L., c. 102, §§ 1-22; Pub. St., c. 102, §§ 1-25; St. 1894, c. 235, c. 428; St. 1895, c. 379; St. 1896, c. 396; St. 1890, c. 73; St. 1885, c. 316; St. 1893, c. 436; St. 1885, c. 358; St. 1897, c. 305; St. 1884, c. 169; St. 1893, c. 292. *Mason v. Thompson*, 9 Pick. 280; *Dickinson v. Winchester*, 4 Cush. 114; *Commonwealth v. Weatherbee*, 101 Mass. 214; *Burbank v. Chapin*, 140 Mass. 123; *Davis v. Gay*, 141 Mass. 531; *Spring v. Hager*, 145 Mass. 186; *Commonwealth v. Vieth*, 155 Mass. 442; *Commonwealth v. Arnold*, 4 Pick. 251; *Commonwealth v. Bolkom*, 3 Pick. 281; *Commonwealth v. Maxwell*, 2 Pick. 139; *Doane v. Russell*, 3 Gray, 382; *Hall v. Pike*, 100 Mass. 495; *Clark v. Burns*, 118 Mass. 275; *Bryant v. Rich’s Grill*, 216 Mass. 344; *Commonwealth v. Meckel*, 221 Mass. 70.

<sup>640</sup> *Hall v. Pike*, 100 Mass. 495.

duration of the plaintiff's stay, the price paid, the amount of accommodation afforded, the transient or permanent character of the plaintiff's residence and occupation, his knowledge or want of knowledge of any difference of accommodation afforded to, or price paid by, boarders and guests, are all to be regarded in settling this question. It is expressly decided, however, in *Berkshire Woollen Co. v. Proctor*,<sup>641</sup> that an agreement with an innkeeper for the price of board by the week is not decisive that the relation is that of boarder, instead of guest."<sup>642</sup>

"A man may be an innkeeper, although he keeps an inn imperfectly, or combines that employment with others; if he is prepared and holds himself out to the public as ready to entertain travellers, strangers and transient guests, with their teams and carriages, after the manner usual with innkeepers, although he may sometimes make special bargains with his customers, may not keep his house open in the night and may not keep the stable at which he puts up the horses of those who stop with them at his house."<sup>643</sup>

§ 319. **Enforcement of lien.**—"An innholder, after retaining for six months<sup>644</sup> from the time of departure of a guest from his inn any trunks, bags, valises, parcels, clothing, goods or other personal property of a guest which has been abandoned by such guest, or which such innholder retains by virtue of his lien thereon for the unpaid board, lodging and other charges of such guests, may sell the same by public auction upon the premises of the inn, notice of the time and place of sale first being posted in a conspicuous place in the office of the inn for four weeks prior to the date of such sale, and published once in each of three successive weeks in a newspaper, if any, published in the town where the inn is situated; otherwise, in a newspaper published in the county where the inn is situated, the first publication of such notice to be not less than twenty-one days before the day of sale. A copy of such notice shall be sent by registered mail addressed to said guest at the residence given by him in the register of such inn. Such notice shall contain a descriptive list of all such property and of all such specific marks as may serve to identify

<sup>641</sup> 7 Cush. 417, 424.

<sup>642</sup> *Hall v. Pike*, 100 Mass. 495, 497, per Colt, J.

<sup>643</sup> Hoar, J., in *Commonwealth v. Wetherbee*, 101 Mass. 214.

<sup>644</sup> St. 1894, c. 181.

such property, and the name of the guest so far as known to such innholder." <sup>645</sup>

"The proceeds of such sale, after deducting reasonable charges and expenses incurred in the storage and sale of such property, shall be applied to the discharge of the lien of such innholder thereon for the board, lodging and other charges of such guest, and any proceeds remaining thereafter shall be paid to the commonwealth." <sup>646</sup> If, within three years after any such sale, the owner of any such property claim it and proves his ownership thereof, the said proceeds, after deducting all reasonable charges and expenses, shall be paid over to him by the state treasurer." <sup>647</sup>

§ 320. Dissolution of lien.—The lien may be dissolved by giving bond in the manner described for the dissolution of the lien of boarding-house and lodging-house keepers, in § 317 *supra*. <sup>648</sup>

## SECTION XI

### BANKRUPTCY AND RECEIVERSHIP

§ 321.—In general. The Federal Bankruptcy Act <sup>649</sup> superseded the state insolvent law, and took effect for voluntary proceedings August 1, 1898, and for involuntary proceedings, November 1, 1898. <sup>650</sup> This act contains no special provisions as to landlord and tenant law or as to the proving of claims for rent. It is probable, therefore, that the decisions

<sup>645</sup> G. L., c. 140, § 14; R. L., c. 102, § 14; St. 1894, c. 181; St. 1893, c. 419, § 1.

<sup>646</sup> G. L., c. 140, § 15; R. L., c. 102, § 15; St. 1893, c. 419, § 2.

<sup>647</sup> *Ibid.*, § 16; R. L., c. 102, § 16; St. 1893, c. 419, § 3.

<sup>648</sup> G. L., c. 255, § 33.

<sup>649</sup> Act July 1, 1898, c. 531. 30 Stat. L. 544.

<sup>650</sup> The state insolvent law ceased to have any effect after July 1, 1898, and the courts had no jurisdiction to entertain petitions for insolvency proceedings after that date. The bankruptcy act provided that "this act shall go into full force and effect upon its passage." This indicated an intent that the act should take effect then, although the period for filing petitions under it was delayed. *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178; *Blake v. Francis-Valentine Co.*, 89 Fed. Rep. 691 (Cal.); *Re Bruss-Ritter Co.*, 90 Fed. Rep. 651.

The acts of 1841 and 1867, containing different wording, did not take effect until the first day on which proceedings could be instituted. *Day v. Bardwell*, 97 Mass. 246; *Judd v. Ives*, 4 Met. 401; *Swan v. Littlefield*, 4 Cush. 574.

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will follow as far as practicable those under previous acts and under the state insolvent law.

It is the duty of the court in administering the bankruptcy law to recognize any preference which the landlord may be entitled to by virtue of the state law.<sup>651</sup>

When once the bankruptcy court has jurisdiction, the only remedy of the landlord to get possession, as against the tenant, is in that court, and the process of the state court will not answer.<sup>652</sup>

**§ 321a. Bankruptcy of tenant.—Acts of bankruptcy; preferences.**—Fraudulent transfers to hinder creditors and transfers with intent to prefer certain creditors are acts of bankruptcy.<sup>653</sup>

A payment by an insolvent tenant within four months of being a bankrupt, which the landlord applied not to rent for the current year, but to prior rent in arrears, constitutes a preference; since as to such rent the landlord is an ordinary creditor.<sup>654</sup>

The payment of rent is not a preference where it is made in good faith and with no wish to defraud other creditors.<sup>655</sup> But if the payment is made to defraud other creditors and keep the business going so as to be able to contract new debts, it is a preference;<sup>656</sup> and so in the case of a payment of rent by an insolvent corporation in order to prevent the forfeiture of a valuable lease is a technical act of bankruptcy.<sup>657</sup>

A transfer by an insolvent tenant against whom a suit for rent is pending, to his wife, who knew of the suit, and transferred it to a corporation organized by her of which the stock was all held by both, is a preference.<sup>658</sup>

<sup>651</sup> *Re McConnell*, 9 N. B. R. 387 (case of lien, N. J.); *Re Wynne*, 4 N. B. R. 5.

<sup>652</sup> *Re Chalmers*, 98 Fed. Rep. 865; *Re Steadman*, 8 N. B. R. 319. The possession of the bankrupt, after the petition is filed, is the possession of the bankruptcy court, and any interference, except by leave of court, is in contempt of its authority. *Re Steadman*, 8 N. B. R. 319; *Re Bishop*, 153 Fed. Rep. 304; *Re Duble*, 117 Fed. Rep. 794. *Contra*, *Re Lucius M. Hart Co.*, 17 N. B. R. 459. *Cp. Re Metz*, 6 Ben. 671.

<sup>653</sup> See Black on Bankruptcy, § 79.

<sup>654</sup> *Re L. J. Bergdoll Motor Co.*, 225 Fed. 87.

<sup>655</sup> *Re Locke*, 1 Lowell, 293, 2 N. B. R. 382.

<sup>656</sup> *Re Lange*, 97 Fed. 107.

<sup>657</sup> *Re Merchants Ins. Co.*, 6 N. B. R. 43 (Ill.).

<sup>658</sup> *Block v. Academy Ball Room*, 221 Fed. 1004.

§ 322. **Effect on lease itself.**—"An adjudication of bankruptcy does not dissolve or terminate the contractual relations of the bankrupt. . . . Its effect is to transfer to the trustee all the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or to renounce these."<sup>659</sup> The law is in Massachusetts that a lease is not necessarily terminated by the bankruptcy of the tenant;<sup>660</sup> In other words, unless the trustee in bankruptcy elects to assume the lease, the tenant remains liable upon it.<sup>661</sup> The theory of the decisions opposing this view is, that after adjudication, the bankrupt is legally impotent to be a tenant; that the trustee, having no authority to continue the business, has generally no use for the premises, and under the bankruptcy act has no authority to be a tenant; and that, if he needs the premises for the purpose of disposing of the assets, he may make a new contract with the landlord.<sup>662</sup> The bankruptcy transfers the lease to the trustee (subject to his election not to take it) by operation of law, and not by sale or by act of the bankrupt; and therefore a sale of the lease by the trustee is not a breach of a condition giving the lessor a right of re-entry in case of assignment by the lessee or a sale of his interest under execution or other legal process, where there is no covenant against transfer by operation of law.<sup>663</sup>

There are various decisions in line with the general doctrine stated in the text. Thus, where a lease provided that "should the lessee at any time fail to pay the rent punctually, at ma-

<sup>659</sup> *Watson v. Merrill*, 136 Fed. 359, 363, per Sanborn, J.; *Re Ells*, 98 Fed. 967 (D. C. Mass.); *Re Roth*, 174 Fed. 64; *Re Sherwoods*, 210 Fed. 754; *Re Roth*, 181 Fed. 667.

<sup>660</sup> *Re Ells*, 98 Fed. Rep. 967 (D. C. Mass.); *Re Curtis*, 109 La. 171; *Re Pennewell*, 119 Fed. Rep. 139; *Woodworth v. Harding*, 75 App. Div. (N. Y.) 54; *Re Adams*, 134 Fed. Rep. 142; *Lindeke v. Associates Realty Co.*, 146 Fed. Rep. 630; *Coleman Co. v. Withoft*, 195 Fed. 250; *Re Roth & Appel*, 181 Fed. 667; *Re Scruggs*, 205 Fed. 673; *Watson v. Merrill*, 136 Fed. 359; *Re Sherwoods*, 210 Fed. 754. *Contra*, *Re Jefferson*, 93 Fed. Rep. 951; *Bray v. Cobb*, 100 Fed. Rep. 270; *Bailey v. Loeb*, 2 Fed. Cas. 376; *Re Webb*, 29 Fed. Cas. 494; *Re Breck*, 4 Fed. Cas. 43; *Re Hays, Foster & Ward Co.*, 117 Fed. Rep. 879.

<sup>661</sup> *Re Sherwoods*, 210 Fed. 754; *Re Roth & Appel*, 181 Fed. 667.

<sup>662</sup> *Re Hays, Foster & Ward Co.*, 117 Fed. Rep. 879, 881. See remarks in *Atkins v. Wilcox*, 105 Fed. Rep. 595, criticising, obiter, the decision of Lowell, J., in *Re Ells*, 98 Fed. Rep. 967.

<sup>663</sup> *Gazley v. Williams*, 210 U. S. 41, 147 Fed. 678.

turity, as stipulated, the rent for the whole unexpired term of this lease shall . . . at once become due and exigible," it was held that the filing of a petition in bankruptcy by the lessee, he not being at the time in default as to his rent, did not mature notes given for rent to accrue in the future, or the lessor's right to enforce proceedings thereon.<sup>664</sup>

A receiver appointed under § 2 (3) of the act is entitled to enjoin a lessor who brought summary process before he qualified as receiver, but who has not yet recovered possession under the summary process;<sup>665</sup> although, if serious damage is likely to result to the lessor from the receiver's occupation, he may petition the court to have the goods of the bankrupt removed and the premises vacated.<sup>666</sup>

A notice to quit served on a tenant is good, though he be subsequently adjudicated bankrupt, and no new notice to the trustee is necessary;<sup>667</sup> and a forfeiture for breach of a covenant to erect a building may be enforced as against the trustee.<sup>668</sup>

§ 322a. **Termination of lease by landlord under clause as to bankruptcy.**—If there is a clause in the condition of the lease providing for a forfeiture upon the bankruptcy of the lessee, the adjudication does not of itself determine the lease, but the lessor must enter as in other cases.<sup>669</sup> Upon reëntry, or judg-

<sup>664</sup> *Atkins v. Wilcox*, 105 Fed. Rep. 595. *Cp.* Act of 1867, § 19; *Wilson v. Pennsylvania Trust Co.*, 114 Fed. Rep. 742.

<sup>665</sup> *Re Kleinhans*, 113 Fed. Rep. 107. So the referee may enjoin lessees under a lease subsequent to the original lessee's adjudication as a bankrupt, his trustee being entitled to possession. *Re Adams*, 134 Fed. Rep. 142.

<sup>666</sup> *Re Kleinhans*, 113 Fed. Rep. 107.

<sup>667</sup> *Lindeke v. Associates Realty Co.*, 146 Fed. Rep. 630.

<sup>668</sup> *Ibid.*

<sup>669</sup> *Ex parte Houghton*, 1 Lowell, 554; *Savory v. Stocking*, 4 Cush. 607; *Treadwell v. Marden*, 123 Mass. 390; *Re Ells*, 98 Fed. 967 (Mass.); *Re Sherwoods*, 210 Fed. 754. *Contra*: *Re Jefferson*, 93 Fed. 948, 951 (Ky.). See *Re Breck*, 8 Ben. 93; *Re Dyke & Marr*, 9 N. B. R. 430; *Ellis v. Small*, 209 Mass. 147, 150.

A mortgage which provides for its termination, if the trustee, in case of the bankruptcy of the lessee, shall not accept the lease within ten days after his appointment, is a security for the payment of rent up to the time when the trustee elects not to take the lease, although more than ten days have elapsed. *Re Yeaton*, 1 Lowell, 420. It seems that, where chattel mortgages are required to be recorded, such a lease should be recorded. *Ibid.*



ment for possession in an action of ejectment, the lease is thereby terminated, and the landlord cannot prove for rent subsequently accruing.<sup>670</sup>

A wish to reënter is not enough to terminate the lease, if the landlord is in fact prevented by a receiver or trustee from doing so,<sup>671</sup> and the court of bankruptcy has jurisdiction of a proceeding to test the lessor's right of reëntry.<sup>672</sup> As it may be important for the trustee to occupy for a limited time, a receiver may enjoin a lessor who brought summary process before he qualified as receiver, but who has not yet recovered possession under the summary process;<sup>673</sup> although, if serious damage is likely to result to the lessor from the receiver's occupation he may petition the court to have the bankrupt's goods removed and the premises vacated.<sup>674</sup> And, similarly, the landlord may be enjoined from interfering with the possession of a trustee, where the bankrupt's goods cannot at once be removed without loss, and the trustee gives a bond to protect the landlord.<sup>675</sup>

Where there is a further provision that the lessee on bankruptcy shall pay the difference between the rent reserved and the rental value "as damages" such sum cannot be proved against the estate.<sup>676</sup> So, when a lessor has an option to terminate the lease or to demand payment for the unexpired term, and he exercises his option after the appointment of a receiver, he cannot prove for the sum claimed as it did not exist until his election.<sup>677</sup>

§ 323. Nature of trustee's title.—"All the rights and all the duties of the bankrupt in respect to whatever property not expressly excluded from the operation of the act he may hold,

<sup>670</sup> *South Side Trust Co. v. Watson*, 118 C. C. A. 278, reversing 200 Fed. 50. *Cp. Re Van Da Grift Motor Car Co.*, 192 Fed. 1015.

<sup>671</sup> As to what happens in this case, see *infra*, § 322*b*.

<sup>672</sup> *Gazley v. Williams*, 210 U. S. 41, aff'g 147 Fed. 678.

<sup>673</sup> *Re Kleinhans*, 113 Fed. 107. So the referee may enjoin lessees under a lease subsequent to the original lessee's adjudication as a bankrupt, his trustee being entitled to possession. *Re Adams*, 134 Fed. 142.

<sup>674</sup> *Re Kleinhans*, 113 Fed. 107.

<sup>675</sup> *Re Schwartzman*, 167 Fed. 339.

<sup>676</sup> *Re Rhoades*, 2 N. B. News, 179; *Slocum v. Soliday*, 183 Fed. 410.

<sup>677</sup> *Wm. Filene's Sons Co. v. Weed*, 230 Fed. 31 (Mass.); *Re Leslie & Griffith Co.*, 230 Fed. 465 (Mass.). *Cf. Cotting v. Hooper, Lewis & Co.*, 220 Mass. 273; *Re Haas*, 213 Fed. 694.



under whatever title, whether legal or equitable, and however encumbered, pass to and devolve upon the assignee at the date of the filing of the petition in bankruptcy."<sup>678</sup> Therefore the lessee's interest, if possessing a market value, passes to the trustee.<sup>679</sup>

The trustee represents all the creditors including the landlord, therefore his occupation cannot be construed to be adverse to the latter.<sup>680</sup>

The trustee "takes only such rights and interests as the bankrupt himself had and could assert at the time of the bankruptcy," except in case of fraud;<sup>681</sup> and he takes subject to the conditions in any leases to which the bankrupt is a party.<sup>682</sup> Therefore, if the trustee holds over after the expiration of a lease and notice to quit, he is liable as a trespasser;<sup>683</sup> and notice to the lessee operates also as notice to his trustee, without any new notice.<sup>684</sup> But, if the trustee has entered under the lease, he cannot be made a trespasser by a subsequent notice to quit.<sup>685</sup>

So, a lease of the bankrupt's property, valid against him, although not recorded as it should have been, is good against the trustee, although he had no knowledge of it.<sup>686</sup> And a receiver, not being an assignee of the lease, must sue for accrued rent in the name of the lessor.<sup>687</sup> Where the covenants of a lease have

<sup>678</sup> *Re Wynne*, 4 N. B. R. 5 (Va.), per Chase, C. J.

<sup>679</sup> *Re Thressen*, 2 N. B. News, 628; *Wildman v. Taylor*, 4 Ben. 42; *Re Frasin*, 174 Fed. 713; *Crowe v. Baumann*, 190 Fed. 399; *Olden v. Gassman*, 68 N. J. Eq. 799; *Re Sherwoods*, 210 Fed. 754. See *Lyon v. Moore*, 259 Ill. 23.

<sup>680</sup> *Loutos v. Coppard*, 246 Fed. 803.

<sup>681</sup> *Goss v. Coffin*, 17 N. B. R. 332 (Me.), per Virgin, J.; *Re Wynne*, 4 N. B. R. 5 (Va.); *Re Steadman*, 8 N. B. R. 318 (Ga.); *Wildman v. Taylor*, 4 Ben. 42 (Conn.); *Montello Brick Co. v. Trexler*, 167 Fed. 482, 163 Fed. 624 (removal of trade fixtures); *Re Sherwoods*, 210 Fed. 754; *Re Scruggs*, 205 Fed. 673; *Re Alden*, 16 A. B. R. 362; *Zartman v. First National Bank of Waterloo*, 216 U. S. 134; *Re Plase*, 224 Fed. 778; *Rosenblum v. Uber*, 256 Fed. 584.

<sup>682</sup> *Ellis v. Small*, 209 Mass. 147. See *infra*, § 325.

<sup>683</sup> *Re Hunter*, 151 Fed. 904. Cp. *Re St. Louis Gas Co.*, 168 Fed. 934.

<sup>684</sup> *Lindecke v. Associates Realty Co.*, 146 Fed. 630.

<sup>685</sup> *Re Rubel*, 166 Fed. 131.

<sup>686</sup> *Goss v. Coffin*, 17 N. B. R. 322. See *Noble v. Brooks*, 224 Mass. 288, 292; *Wilson v. Welch*, 157 Mass. 77, 80, 81.

<sup>687</sup> *Noble v. Brooks*, 224 Mass. 288, 292.

been performed, or discharged, the trustee is entitled to recover a sum held by the lessor as security.<sup>688</sup>

The validity of claims against the interest of the bankrupt, aside from any federal statute applicable, is to be determined by the local law.<sup>689</sup>

Under the general principle above stated that the trustee has no more rights than the bankrupt, where there was a lease of a farm and stock, and the lessor reserved title to hay and fodder to insure the preservation of the stock, and the lessee on bankruptcy surrendered possession, rent having been paid up to that time, it was held the trustee had no claim upon the hay and fodder or their proceeds.<sup>690</sup>

So where a trustee takes possession of mortgaged property and on foreclosure the proceeds are not enough to discharge the mortgage, rents collected between the adjudication of bankruptcy and the foreclosure may be required to be applied to the payment of the mortgage.<sup>691</sup>

So where the tenant has installed fixtures which remain his individual property the landlord cannot claim them as against the tenant's trustee.<sup>692</sup>

Where the landlord consents, the trustee may surrender a lease, terminating thereby any unmatured obligations of the bankrupt tenant; but he has no greater rights as to a surrender than the tenant had.<sup>693</sup>

And if the landlord accepts the surrender only upon an express condition, there is no surrender, and the tenant's obligations are just what they were before, the act of the trustee amounting only to a refusal to take over the lease.<sup>694</sup>

§ 323a. **Liens for rent.**—There is no statutory lien for rent in Massachusetts, as there is in many other states. A lien may, however, be given by the term of the lease. In such a case, it is valid both against the lessee and his trustee, as to property already upon the premises, unless in conflict with some stat-

<sup>688</sup> *Hall v. Middleby*, 197 Mass. 485, 490.

<sup>689</sup> *Re Scruggs*, 205 Fed. 673; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545.

<sup>690</sup> *Re Place*, 224 Fed. 778.

<sup>691</sup> *Re Dooner & Smith*, 243 Fed. 984; *Burdseil v. Liberty Trust Co.*, 248 Fed. 112.

<sup>692</sup> *Re West*, 253 Fed. 963.

<sup>693</sup> *Rosenblum v. Uber*, 256 Fed. 584.

<sup>694</sup> *Ibid.*

ute;<sup>695</sup> and such lien secures all rent down to the time of bankruptcy.<sup>696</sup> But the lien does not cover articles not on the premises at the time possession was given under the lease.<sup>697</sup>

If the landlord asserts his lien, the trustee has the option to pay the claim of the landlord, or he may surrender the premises leaving the landlord to perfect his claim. If the trustee retains the property for the purpose of winding up the estate, he may charge the rent during that time as part of the expenses of administration.<sup>698</sup> But if, where the landlord has asserted a lien, he is overpaid by the trustee, his liability to repay the excess is primary, although the trustee may also be liable to the estate.<sup>699</sup>

§ 323b. **Sale of leasehold by trustee.**—In the absence of a right of reëntury by the landlord in case of a transfer by operation of law, the trustee may sell the lessee's interest.<sup>700</sup> But, in doing so, he must not sacrifice the lessor's interest, and should either require a bond from the purchaser or sell for a price which covers the balance of rental for the entire term and hand it over to the lessor.<sup>701</sup> If he cannot do either of these things he should surrender the lease.<sup>702</sup>

The purchaser from the trustee gets precisely the rights the bankrupt had, and no more.<sup>703</sup>

§ 323c. **Trustee not bound to accept lease.**—The duty of the trustee is to do whatever is for the benefit of the estate. He is, therefore, not bound to take a leasehold estate unless it is for the good of the creditors;<sup>704</sup> and he has a reasonable time

<sup>695</sup> *Re Eckroth*, Fed. Cas. No. 4265; *McLean v. Klein*, 3 Dill. 113; *Re Sapinsky*, 206 Fed. 523. *Cp. Re Gallacher Coal Co.*, 205 Fed. 183.

<sup>696</sup> *McLean v. Klein*, 3 Dill. 113.

<sup>697</sup> *Re Eckroth*, Fed. Cas. No. 4265. *Cp. Re Dyke & Marr*, 9 N. B. R. 430. See also as to Liens, *infra*, § 328.

<sup>698</sup> *Louisville Woolen Mills v. Tapp*, 239 Fed. 463.

<sup>699</sup> *Ibid.*

<sup>700</sup> *Gazley v. Williams*, 210 U. S. 41, 147 Fed. 678; *Re Sherwoods*, 210 Fed. 754; *Re Becker*, 98 Fed. 407.

<sup>701</sup> *Re Gutman*, 197 Fed. 472.

<sup>702</sup> *Ibid.*

<sup>703</sup> *Jacob v. Kellogg*, 107 N. Y. S. 713 (question of removal of fixture).

<sup>704</sup> *White v. Griffing*, 18 N. B. R. 399, 44 Conn. 437; *Re Luckenbill*, 127 Fed. 984; *Ex parte Faxon*, 1 Lowell, 404, 405; *Summerville v. Kelliher*, 144 Cal. 155; *Re Chalmers, Calder & Co.*, 98 Fed. 865; *Re Sherwoods*,

to ascertain whether such action will be beneficial.<sup>705</sup> He must however, either accept or reject the lease, and cannot seek its cancellation.<sup>706</sup>

§ 324. What constitutes acceptance of lease by trustee.— It is well settled that the trustee in bankruptcy or the assignee in insolvency of a tenant does not, merely by accepting the assignment, become liable for the rent reserved by the lease,<sup>707</sup> and he is not bound to accept the lease unless it is for the benefit of creditors.

He does not become assignee of the lease or term,<sup>708</sup> and cannot therefore be held on the covenants. "The law has become settled that there must be some positive and unequivocal act of acceptance before the assignee will be held liable. . . . No mere neglect has ever been held an acceptance unless after notice from the landlord that it will be so considered."<sup>709</sup> There must be an election or "some occupation and use of or some dealing and intermeddling with the estate, or some act, admission or agreement which in terms or by necessary implication constitutes an election."<sup>710</sup> Thus where the keys are given to the trustee, and he immediately returns them to the bankrupt's attorneys, he does not become liable for rent which had accrued before he took possession;<sup>711</sup> and where an assignee did not know that a certain shop was included in the leased premises, he was held not liable for rent.<sup>712</sup> So, merely allowing

210 Fed. 754; *Re Scruggs*, 205 Fed. 673; *Re Mullins Clothing Co.*, 238 Fed. 58; *Rosenblum v. Uber*, 256 Fed. 584.

<sup>705</sup> *White v. Griffing*, 18 N. B. R. 399, 44 Conn. 437; *Ex parte Houghton*, 1 Lowell, 554; *Re Mahler*, 105 Fed. 428; *Re Ellis*, 98 Fed. 967 (D C. Mass.); *Re Rubel*, 166 Fed. 131; *Re Scruggs*, 205 Fed. 673; *Re Sherwoods*, 210 Fed. 754; *Re Mullins Clothing Co.*, 238 Fed. 58; *Rosenblum v. Uber*, 256 Fed. 584.

<sup>706</sup> *Re J. Sapinsky & Sons*, 206 Fed. 723.

<sup>707</sup> *Re Washburn*, 11 N. B. R. 66 (Mass.); *Commonwealth v. Franklin Ins. Co.*, 115 Mass. 278; *Bell v. American Protective League*, 163 Mass. 558, 561; *Re Ten Eyck & Choate*, 7 N. B. R. 26; *Re Ives*, 18 N. B. R. 28; *Re Lucius M. Hart Co.*, 17 N. B. R. 459; *Bray v. Cobb*, 100 Fed. Rep. 270; *Re Chalmers, Calder & Co.*, 98 Fed. Rep. 865.

<sup>708</sup> *Re Washburn*, 11 N. B. R. 66; *Hoyt v. Stoddard*, 2 Allen, 442; *Re Ives*, 18 N. B. R. 28. *Cp.*, under the state law, G. L., c. 216, § 54.

<sup>709</sup> Lowell, J., in *Re Washburn*, 11 N. B. R. 66.

<sup>710</sup> *Commonwealth v. Franklin Ins. Co.*, 115 Mass. 278, *Endicott, J.*; *Re Frasin*, 183 Fed. 28; *Re Washburn*, 11 N. B. R. 66.

<sup>711</sup> *Re Cubbler*, 184 Fed. 338.

<sup>712</sup> *Re Washburn*, 11 N. B. R. 66.

the goods of the bankrupt to remain upon the premises; is not sufficient to prove an acceptance,<sup>713</sup> especially if an express notice of intention not to accept the lease be given to the landlord.<sup>714</sup> Nor is the releasing of a subtenant an acceptance.<sup>715</sup> Nor, in general, mere occupation of the premises independently of the lease; <sup>716</sup> especially when the trustee knows nothing of the existence of the lease and removes the bankrupt's goods on learning of it.<sup>717</sup>

On the other hand, it seems that a sale of the interest of the bankrupt and the receipt of a sum of money therefor may amount to an acceptance by the assignee.<sup>718</sup> And, where the sale was to the lessor, it was held to discharge a guarantor of rent from the date of the filing of the petition by the bankrupt.<sup>719</sup> Some of the English cases hold, however, that offering a lease for sale, or even using the premises to sell goods of the bankrupt, is not evidence of an election to take the lease.<sup>720</sup>

Where a trustee attempted to surrender a lease, but the landlord accepted only upon an express condition it was held there was no surrender but that the transaction was evidence of an election by the trustee not to take over the lease.<sup>721</sup>

§ 325. Effect of acceptance of lease by trustee.—If the trustee accepts the lease, he is bound by its covenants,

<sup>713</sup> *Re Yeaton*, 1 Lowell, 420; *Re Washburn*, 11 N. B. R. 66; *Wales v. Chase*, 139 Mass. 538 (goods left two months); *Cook v. Medbury*, 150 Mass. 499; *Re Lucius M. Hart Co.*, 17 N. B. R. 459 (N. Y.); *Re Hays*, 117 Fed. Rep. 879.

<sup>714</sup> *Re Washburn*, 11 N. B. R. 66 (goods left 12 months).

<sup>715</sup> *Ibid.*

<sup>716</sup> *Re Ten Eyck & Choate*, 7 N. B. R. 26; *Re Stanton Co.*, 162 Fed. 169.

The state law provided that the assignee might at any time, and must within twenty days after the written request of the debtor, or of the lessor, or of those having his estate in the premises, file his written election in the case, and that if he disclaimed this should operate as a surrender of the term as of the date of filing such disclaimer. G. L., c. 216, § 33; R. L., c. 163, § 33; Pub. St., c. 157, § 26; St. 1879, c. 245, § 1.

This act did not apply to a lease determined before the first publication of the notice. *Bowditch v. Raymond*, 146 Mass. 109.

<sup>717</sup> *Re Washburn*, 11 N. B. R. 66.

<sup>718</sup> *White v. Griffing*, 44 Conn. 437; s. c., 18 N. B. R. 399.

<sup>719</sup> *Ibid.*

<sup>720</sup> See *Re Washburn*, 11 N. B. R. 66.

<sup>721</sup> *Rosenblum v. Uber*, 256 Fed. 584.

and his acceptance takes effect from the filing of the petition.<sup>722</sup> Therefore he is liable for all rent falling due from the filing of the petition until the end of the term.<sup>723</sup> The estate is liable as to the time between the filing of the petition in bankruptcy and the appointment of the trustee, not on the theory of contract but on the theory of benefit received.<sup>724</sup> The assumption of the lease by the trustee operates precisely like any other assignment, and the bankrupt is released from all liability for rent thereafter.<sup>725</sup>

§ 326. **Effect of non-acceptance by trustee.**—"If the assignee elects not to take, the lease remains in the bankrupt, with all its advantages and all its burdens, and free from all claims of right either of the assignee or of the creditors."<sup>726</sup> In such a case, therefore, the bankrupt is personally liable for the rent.<sup>727</sup>

If, however, after the commencement of bankruptcy proceedings, the trustee occupies the premises, this may be with or without the consent of the court. If it is without the consent of the court, the trustee is personally liable for the rent.<sup>728</sup> If the trustee occupy with the consent of the court, the land-

<sup>722</sup> *White v. Griffing*, 18 N. B. R. 399, 44 Conn. 437; *Re Wynne*, 4 N. B. R. 5; *Ellis v. Small*, 209 Mass. 147, 150.

<sup>723</sup> *Re Laurie*, 4 N. B. R. 32; s. c., 1 Lowell, 404; *Re Walton*, 1 N. B. R. 557; s. c., 1 Deady, 598; *Re Appold*, 1 N. B. R. 621; s. c., 6 Phila. 265; *Re Merrifield*, 3 N. B. R. 98; *Re Hufnagel*, 12 N. B. R. 554; *Re Dunham*, 7 Phila. (Pa.) 611; *Re Webb*, 6 N. B. R. 302; *Re Butler*, 6 N. B. R. 501; *Re Lynch & Bernstein*, 7 Ben. 26; *Ex parte Faxon*, 1 Lowell, 404; *Re Jefferson*, 93 Fed. Rep. 948; *Re Grimes*, 96 Fed. Rep. 529; *Bray v. Cobb*, 100 Fed. Rep. 270; *Re Ellis*, 98 Fed. Rep. 967; *Re Gerson*, 2 Am. Bank. Rep. 170; *Re Schwartzmann*, 167 Fed. 399; *Brooklyn Improvement Co. v. Lewis*, 122 N. Y. S. 111; *Matter of Otis*, 110 N. Y. 580; *Summerville v. Kelliher*, 144 Cal. 155.

<sup>724</sup> *Re Wheeler*, 18 N. B. R. 385.

<sup>725</sup> *Rosenblum v. Uber*, 256 Fed. 584.

<sup>726</sup> 3 *Parsons on Contracts*, 9th ed., 441; *Watson v. Merrill*, 136 Fed. 359, 364; *Re Roth*, 181 Fed. 667; *Re Sherwoods*, 210 Fed. 755; *Rosenblum v. Uber*, 256 Fed. 584.

<sup>727</sup> *Re Commercial Bulletin Co.*, 2 Woods, 220; *Ex parte Houghton*, 1 Lowell, 534; *Re Ellis*, 98 Fed. Rep. 967; *Re Roth*, 181 Fed. 667; *Re Sherwoods*, 210 Fed. 755.

<sup>728</sup> *Buckner v. Jewell*, 14 N. B. R. 286; *Re Commercial Bulletin Co.*, 2 Woods, 220, Fed. Cases, No. 3060; *Re Webb*, 6 N. B. R. 302; *Re Metals Refining Co.*, 195 Fed. 226.

lord is entitled to reasonable compensation out of the estate, for the use and occupation of the premises; and, if the trustee has already paid the landlord, he is entitled to be allowed the sum in his expenses.<sup>729</sup> Where the trustee occupies a portion only of the premises, he is liable only for the fair rental value of such portion.<sup>730</sup> And where he surrenders possession to a purchaser of the bankrupt's goods and the landlord might have entered on that day, the trustee is not liable for occupation thereafter.<sup>731</sup>

In the absence of any express agreement between the landlord and the trustee, the recovery is on a *quantum meruit*.<sup>732</sup>

When, however, the landlord waits until the estate has been practically distributed and presents no claim for use and occupation by the trustee, he cannot sue the trustee personally in the state court, and the bankruptcy court will enjoin the action, even though in name it is an action for damages.<sup>733</sup>

This reasonable compensation will often be that stipulated for in the lease, but the landlord is not entitled to this amount

<sup>729</sup> Blumenstiel on Bankruptcy, 282; Collier on Bank. 6th ed., 497; *Re Breck & Schermerhorn*, 12 N. B. R. 215; *Re Hamburger & Frankel*, 12 N. B. R. 277, Fed. Cas. No. 5975; *Re Lynch & Bernstein*, 7 Ben. 26; *Ex parte Faxon*, 1 Lowell, 404; *Re Walton*, 1 N. B. R. 557; *Re Appold*, 1 N. B. R. 621; *Re Merrifield*, 3 N. B. R. 98; *Re Rose*, 3 N. B. R. 265; *Re Webb*, 6 N. B. R. 302; *Re Lucius M. Hart Co.*, 17 N. B. R. 459; *Re Brown*, Fed. Cas. No. 1739a; *Re Butler*, id., No. 2236; *Re Fowler*, id., No. 4997, 8 Ben. 421; *Re Wheeler*, id., No. 17490; *Re Ives*, id., No. 7116; *Bray v. Cobb*, 100 Fed. Rep. 270; *Re Chalmers*, 98 Fed. Rep. 865; *Re Kelly*, 18 Fed. Rep. 528; *Re Arnstein*, 101 Fed. Rep. 706; *Re Hunter*, 151 Fed. Rep. 904; *Re Metz*, 6 Ben. 571; *Re Adams, etc., Cloak House*, 199 Fed. 337; *Re Grignard Lithographing Co.*, 158 Fed. 557; *Re Abrams*, 200 Fed. 1005; *Re Luckenbill*, 127 Fed. 984; *Re Jefferson*, 93 Fed. 948; *Re Grimes*, 96 Fed. 529; *Re Secor*, 18 Fed. 319; *Re Hinckel Brewing Co.*, 123 Fed. 942; *Re McGrath*, 5 N. B. R. 254; *Re Metz*, 6 Ben. 571; *Re Croney*, 8 Ben. 64; *Re Hufnagel*, 12 N. B. R. 554; *Re Sherwoods*, 210 Fed. 754; *Re Mullins Clothing Co.*, 230 Fed. 681; *Re Crawford Plummer Co.*, 253 Fed. 76.

So, under the state law, formerly. *Cp.* G. L., c. 216, § 23; R. L., c. 163, § 23; Pub. St., c. 157, § 26; Gen. St., c. 118, § 52; St. 1838, c. 163, § 11; *Abbott v. Stearns*, 139 Mass. 168.

<sup>730</sup> *Re Stanton Co.*, 162 Fed. 169.

<sup>731</sup> *Re Rubel*, 166 Fed. 131.

<sup>732</sup> *Re Adams Cloak House*, 199 Fed. 337; *Re Grignard Co.*, 155 Fed. 699, 158 Fed. 557.

<sup>733</sup> *Re Empire Construction, etc., Co.*, 157 Fed. Rep. 495 (N. Y.).



as a matter of law.<sup>724</sup> Where the assignee used the premises for storage it was held that their value for that purpose was a sufficient allowance to the owner.<sup>725</sup> If the owner wishes a certain rate of compensation equal, for example, to that offered by other persons, he should apply to the court to sanction that rate or to order the premises to be vacated; it is not sufficient to make this request of the marshal.<sup>726</sup> In exceptional cases more than the rent reserved may be allowed.<sup>727</sup>

The theory upon which the trustee may be authorized to occupy the premises for a time, without assuming the lease, is that "a landlord who lets premises to be occupied by a tenant for purposes of trade must be held to do so with the full understanding that the tenant may be proceeded against in bankruptcy, and that the bankrupt court may be called upon to take possession of the goods of the tenant on the premises."<sup>728</sup> Thus it may often be necessary to occupy the premises for a short time in order to dispose of such goods, and for this privilege of the trustee, the landlord is entitled to a fair compensation, which is a proper expense of administering the estate.<sup>729</sup>

<sup>724</sup> *Re Breck*, 8 Ben. 93; *Re Lynch & Bernstein*, 7 Ben. 26; *Re Brown*, Fed. Cas. No. 1973 a; *Re Adams, etc., Cloak House*, 199 Fed. 337; *Re Kelly, etc., Co.*, 102 Fed. 747; *Wilson v. Trust Co.*, 114 Fed. 742; *Re Luckenbill*, 127 Fed. 984; *Re Winfield Co.*, 137 Fed. 984; *Re Rubel*, 166 Fed. 313, 170 Fed. 1021; *Re Appold*, 1 N. B. R. 621; *Re Cronson*, 1 N. B. News, 474; *Re Sherwoods*, 210 Fed. 754; *Re Crawford Plummer Co.*, 253 Fed. 76; *Fleming v. Noble*, 250 Fed. 733; *Gardner v. Gleason*, 259 Fed. 755 (C. C. A. Mass.). But if one with whom property of the bankrupt was stored claims a lien without right, and refuses to deliver the property, he is not entitled to compensation for storage after the date of such refusal. *Re Kelly*, 18 Fed. Rep. 528.

<sup>725</sup> *Re Fowler*, 8 Ben. 421; *Re Wheeler*, 18 N. B. R. 385. *Cp. Re Grimes*, 96 Fed. Rep. 319.

<sup>726</sup> *Re Metz*, 6 Ben. 571; *Re McGrath & Hunt*, 5 N. B. R. 254. In the latter case the landlord did not apply to the court for possession or represent that he could have rented the premises to others, and he was not allowed any compensation at all. *Cp. Cook v. Medbury*, 150 Mass. 499.

<sup>727</sup> *Re Adams Cloak, etc., House*, 199 Fed. 337; *Re Grignard, etc., Co.*, 155 Fed. 699, 158 Fed. 557.

<sup>728</sup> *Re Metz*, 6 Ben. 571, 575 (N. Y.) per Blatchford, J. See *Re Secor*, 18 Fed. Rep. 319.

<sup>729</sup> *Re Secor*, 18 Fed. Rep. 319; *Re Crawford Plummer Co.*, 253 Fed. 76; *Gardner v. Gleason*, 259 Mass. 755 (C. C. A. Mass.); *Randolph v. Scruggs*, 190 U. S. 533, 538.



Similarly, the use of premises for storage of the bankrupt's goods, until the same can be sold, is one of the proper costs of administering the estate; and, if the trustee has no funds to pay the same, he can be ordered to sell sufficient personal property to pay, and such payment takes precedence of exemptions under the state law.<sup>740</sup> But the landlord is not in such a case entitled to the full rental value of the premises, but only what the storage is worth,<sup>741</sup> for the period of his use of the premises.<sup>742</sup> And use by the bankrupt for storage without the knowledge of the trustee creates no liability of the estate to the lessor.<sup>743</sup>

Where an injunction prevents the landlord from ejecting the tenant, the landlord is not entitled to the rents received from the tenant, but must apply to the court for compensation.<sup>744</sup>

Where a trustee holds over, knowing the bankrupt's lease has expired, and notwithstanding a notice to quit, he is a trespasser and personally liable for damages.<sup>745</sup>

**Recovery for use and occupation.** Where a trustee uses the premises without accepting the lease, the compensation of the landlord is not a claim to be proved by him like the claim of a creditor; but is an expense of administration, taking precedence of other claims,<sup>746</sup> even of the claim of the bankrupt to his exemptions.<sup>747</sup>

The assignee cannot pay a claim for use and occupation of premises without an order of court, and without ascertaining whether the assets are sufficient to discharge all the expenses of administration of the same class.<sup>748</sup>

<sup>740</sup> *Re Grimes*, 96 Fed. Rep. 529. *Cp. Re Fowler*, 8 Ben. 421; *Re Wheeler*, 18 N. B. R. 385.

<sup>741</sup> *Re Dunham*, Fed. Cas. No. 4145; *Re Fowler*, 8 Ben. 421; *Re Lucius Hart Mfg. Co.*, 17 N. B. R. 459; *Re Wheeler*, 18 N. B. R. 385.

<sup>742</sup> *Re Merrifield*, 3 N. B. R. 98; *Re Cublier*, 184 Fed. 338.

<sup>743</sup> *Re Washburn*, 11 N. B. R. 66.

<sup>744</sup> *Re Lucius M. Hart Co.*, 17 N. B. R. 459.

<sup>745</sup> *Re Hunter*, 1 Fed. 904.

<sup>746</sup> *Re Jefferson*, 93 Fed. 948; *Re Abrams*, 200 Fed. 1005; *Re Grignard Lithographing Co.*, 158 Fed. 557; *Re Butler*, 6 N. B. R. 501; *Re Hoagland*, 18 N. B. R. 530; *Re Webb*, 6 N. B. R. 302; *Re Rose*, 3 N. B. R. 265. *Cp. § 64 of the act.*

<sup>747</sup> *Re Grimes*, 96 Fed. 529.

<sup>748</sup> *Re Hoagland*, 18 N. B. R. 530.

§ 327. **Proof of rent as such.**<sup>749</sup>—It follows from the fact that the trustee in bankruptcy does not succeed to the covenants in the lease, without an election to do so, that the landlord is not entitled to prove against the estate of the bankrupt tenant any claim for rent accruing subsequently to the time of filing of the petition, either as a debt or as unliquidated damages,<sup>750</sup> nor any claim for storage.<sup>751</sup> “The principle of

<sup>749</sup> See *supra*, §§ 325, 326. As to proof by the surety of a bankrupt tenant who has been compelled to pay under his guaranty of rent, see *Re Baker & Edwards*, 224 Fed. 611.

<sup>750</sup> *Re May & Merwin*, 9 N. B. R. 419, s. c., 7 Ben. 238; *Re Lynch*, 7 Ben. 26; *Re Hufnagel*, 12 N. B. R. 554; *Bailey v. Loeb*, 11 N. B. R. 271; s. c., 2 Woods, 578; *Wylie v. Breck*, 2 Woods, 673; *Re Commercial Bulletin Co.*, 2 Woods, 220; s. c., Fed. Cas. No. 3060; *Re Croney*, 8 Ben. 64; *Bowditch v. Raymond*, 146 Mass. 109, 116; *Savory v. Stocking*, 4 Cush. 607; *Treadwell v. Marden*, 123 Mass. 390; *Deane v. Caldwell*, 127 Mass. 242; *Ex parte Houghton*, 1 Lowell, 554; *Ex parte Lake*, 2 Lowell, 544; *Bosler v. Kuhn*, 8 Watts & S. 183; *Riggin v. Magwire*, 15 Wall. 549; *Ex parte Faxon*, 1 Lowell, 404; *Evans v. Hamrick*, 61 Pa. St. 19. So, under the act of 1898. *Re Ells*, 98 Fed. Rep. 967 (D. C. Mass.); *Bray v. Cobb*, 100 Fed. Rep. 270; *Re Arnstein*, 101 Fed. Rep. 706; *Re Mahler*, 105 Fed. Rep. 428; *Re Jefferson*, 93 Fed. Rep. 951; *Atkins v. Wilcox*, 105 Fed. Rep. 595, 53 L. R. A. 118; *Re Hays, Foster & Ward Co.*, 117 Fed. Rep. 879; *Re Webb*, 29 Fed. Cas. 494; *Re Curtis*, 109 La. 171, 33 So. Rep. 125; *Re Collignon*, 4 Am. Bank. R. 250; *Re Goldstein*, 2 Am. Bank Rep. 603; *Watson v. Merrill*, 136 Fed. Rep. 359; *Scott v. Damarest*, 75 Misc. Rep. (N. Y.) 289; *Re Roth*, 174 Fed. 64; *Re Roth*, 181 Fed. 667; *Re Rubel*, 166 Fed. 131; *Coleman Co. v. Withoft*, 195 Fed. 250; *Re Abrams*, 200 Fed. 1005; *Re Gallacher Coal Co.*, 205 Fed. 183; *Re Shilladay*, 1 N. B. News, 840; *Re Frankel*, 2 N. B. News, 840; *Re Quaker Drug Co.*, 204 Fed. 689; *Re Scruggs*, 205 Fed. 673; *South Side Trust Co. v. Watson*, 200 Fed. 50; *Re Sapinsky*, 206 Fed. 523; *Re Mullins Clothing Co.*, 230 Fed. 681; *Re Merwin & Wiloughby Co.*, 206 Fed. 116; *Kamioner v. Balkind*, 158 N. Y. S. 310; *Zavels v. Reeves*, 227 U. S. 625; *Cotting v. Hooper, Lewis & Co.*, 220 Mass. 273; *Re Mullins Clothing Co.*, 238 Fed. 58; *Lontos v. Coppard*, 246 Fed. 803. *Contra. Re Miller Bros. Grocery Co.*, 208 Fed. 573; *Re Caswell-Massey Co.*, 208 Fed. 571. See *Abbott v. Stearns*, 139 Mass. 168; *Re Yeaton*, 7 Lowell, 420, 422; *Bordman v. Osborn*, 23 Pick. 206; *Re Manuf. Co.*, 131 Fed. Rep. 984. Rev. St., § 5071, which was St. 2 Mar. 1867, c. 176, § 19 (14 Stat. 525), since repealed, provided for the apportionment of rent falling due at fixed periods up to the time of bankruptcy. See *Wylie v. Breck*, 2 Woods, 673; *Treadwell v. Marden*, 123 Mass. 390; *Re Breck*, 8 Ben. 93, Fed. Cas. No. 1822; *Re May*, 7 Ben. 238, Fed. Cas. No. 9325; *Bailey v. Loeb*, 2 Woods, 578, Fed. Cas. No. 739; *Re Webb*, Fed. Cas. No. 17,315.

<sup>751</sup> *Robinson v. Pesant*, 8 N. B. R. 426; s. c., 53 N. Y. 419.

these cases is, that such [future] rent is not a debt absolutely due at the time of the first publication. The lease may be terminated by the eviction of the lessee, or otherwise, and no rent may ever accrue or become due. The lessor's claim is a contingent one. It is not contingent merely as to amount, but the very existence of the claim depends upon a contingency.<sup>752</sup> Rent is to be allowed only up to the time of filing the petition, and not up to the time of adjudication of the fact of bankruptcy;<sup>753</sup> and the same is true of any periodical payments reserved by the lease.<sup>754</sup>

The same principle holds in case of proving against a surety of the tenant.<sup>755</sup> The present act mentions the time of filing the petition in terms.

Of course, where there has been a surrender before the bankruptcy, the lessor cannot prove for rent thereafter;<sup>756</sup> nor can he prove for rent during a period when he himself is in possession of the premises.<sup>757</sup>

The general principle applies to joint liability; and one of two jointly liable for rent cannot prove for one-half of a payment of rent made by the other after the bankruptcy.<sup>758</sup>

<sup>752</sup> *Bordman v. Osborn*, 23 Pick. 295; *Morton, C. J., in Bowditch v. Raymond*, 146 Mass. 109, 114; *Scott v. Demarest*, 75 Misc. Rep. (N. Y.) 289; *Re Abrams*, 200 Fed. 1005; *Cp. Watson v. Merrill*, 136 Fed. Rep. 359. Future rent was held not to be even within the provisions of the St. Aug. 19, 1841, § 5, as an "uncertain or contingent demand." *Riggin, v. Magwire*, 15 Wall, 549; *French v. Morse*, 2 Gray, 111, 115; *Deane v. Caldwell*, 127 Mass. 242, 244; *Savory v. Stocking*, 4 Cush. 607.

<sup>753</sup> *Wylie v. Breck*, 2 Woods, 673 (C. Ct. S. D. Miss. 1875); *Ex parte Faxon*, 1 Lowell, 404; *Re May & Merwin*, 9 N. B. R. 419; *Re Wynne*, 4 N. B. R. 5; *Re Arnstein*, 101 Fed. Rep. 246; *Re Gerson*, 2 Am. B. Rep. 170. See *Re Hayward*, 130 Fed. Rep. 720; *Re Hinckel Brewing Co.*, 123 Fed. Rep. 942; *Re Mahler*, 105 Fed. Rep. 596; *Re Sherwoods*, 210 Fed. 754; *Re Mullins Clothing Co.*, 230 Fed. 681; *Re Laden Tate Co.*, 135 Fed. 910; *Re Saxton Furnace Co.*, 142 Fed. 293. *Contra, Re Webb*, 6 N. B. R. 302 (D. Ct. Ky. 1872). See *Re Goldstein*, 2 Am. Bank. Rep. 603.

<sup>754</sup> *Re Mullins Clothing Co.*, 230 Fed. 681; *Re Laden Tate Co.*, 135 Fed. 910; *Re Saxton Furnace Co.*, 142 Fed. 293.

<sup>755</sup> *Kamionier v. Balkind*, 158 N. Y. S. 310.

<sup>756</sup> *Dallom v. Rebu*, 229 Fed. 554.

<sup>757</sup> *Re H. M. Lasker Co.*, 251 Fed. 53; *Wilson v. Pennsylvania Trust Co.*, 114 Fed. 742, 52 C. C. A. 374; *South Side Trust Co. v. Watson*, 200 Fed. 50, 118 C. C. A. 278.

<sup>758</sup> *Coleman Co. v. Withoft*, 195 Fed. 250. Nor for his share of a bonus for cancelling the lease. *Ibid.*

So, where it is provided that taxes, water rates and the like are to be considered as part of the rent, the landlord may include in his proof all such sums due and unpaid at the date of the bankruptcy;<sup>759</sup> but not sums which were not yet due at that time.<sup>760</sup>

Where, however, the lease provides that, on default in the performance of any covenant, the rent for the entire term at once becomes due and payable, and the tenant commits a breach before his bankruptcy, the landlord may prove for the rent of the entire term,<sup>761</sup> as a general creditor.<sup>762</sup> But, as above stated not for taxes not due at the bankruptcy, even though made payable as part of the rent.<sup>763</sup> The rule is otherwise where the lessor gets a judgment for possession because of the bankruptcy, and he can prove only for rent up to that time.<sup>764</sup> And the same is true where he reënters,<sup>765</sup> as otherwise it would be possible to create a preference.

Nor can the landlord recover the whole rent where the tenant has been guilty of no breach of covenant at the time of his bankruptcy.<sup>766</sup>

Where the provision is that the entire rental becomes due on the bankruptcy of the lessee without reference to any other breach of covenant, the question also arises whether such a claim is a debt within § 63a(1). Some decisions hold that

<sup>759</sup> *Ellis v. Rafferty*, 199 Fed. 80; *McCann v. Evans*, 185 Fed. 93; *Re Sherwoods*, 210 Fed. 254; *Re Spiers-Alper Co.*, 231 Fed. 535.

<sup>760</sup> *Ellis v. Rafferty*, 199 Fed. 80; *Re Pittsburg Drug Co.*, 164 Fed. 482. *Contra*, where taxes fixed in amount but not assessed at the time of the bankruptcy. *Re Spiers-Alper Co.*, 231 Fed. 535.

Where a purchaser of the lessee's stock of goods agreed that his estate should be released from rent after the sale, and later in order to get a new lease had to pay taxes, some of which accrued before and some after the sale, it was held he could not hold the estate liable for them. *Ibid.*

<sup>761</sup> *Re Pittsburg Drug Co.*, 164 Fed. 482. *Cp. Re Miller Bros. Grocery Co.*, 208 Fed. 482 (personalty); *Re Haas*, 213 Fed. 694.

<sup>762</sup> *Re Cronson*, 1 N. B. News, 474.

<sup>763</sup> *Re Pittsburg Drug Co.*, 164 Fed. 482.

<sup>764</sup> *South Side Trust Co. v. Watson*, 118 C. C. A. 278, reversing 200 Fed. 50; *Wilson v. Pennsylvania Trust Co.*, 52 C. C. A. 375.

<sup>765</sup> *Re Merwin*, 206 Fed. 116 (personal property).

<sup>766</sup> *Atkins v. Wilcox*, 105 Fed. 595. When notes have already been given for future instalments of rent, bankruptcy does not mature them. *Ibid.* On the main proposition, see *Re Quaker Drug Co.*, 204 Fed. 689 (personal property).

with the help of § 63a(4) the claim may be proved;<sup>767</sup> other decisions hold that the claim is contingent and cannot be proved.<sup>768</sup> It was held in one case that, where property was taken by eminent domain, and a sum paid to the bankrupt tenant on the theory that he would be liable for rent to the end of the lease, the landlord might prove a claim for the full rent less interest.<sup>769</sup> If the trustee rejects the lease, and the bankrupt collects from subtenants, such collections may be implied to reduce the provable claim.<sup>770</sup>

The fact that the landlord takes a note for the rent due, which is not paid at maturity, does not prevent his proving against the tenant's estate for the rent as if the note had never been given.<sup>771</sup> Nor, in a state where the landlord has a lien<sup>772</sup> for a year's rent, does the fact of such preference prevent his proving a claim for the rent due after the expiration of such year.<sup>773</sup> Such lien is a preferred claim as far as the proceeds of the goods go.<sup>774</sup> Where there is any special fund or property which is security for the rent, the landlord is entitled to have it applied to his claim even if the trustee has already realized on the property.<sup>775</sup> Where by mistake he has omitted to state any security, he may amend his proof.<sup>776</sup>

<sup>767</sup> *Re Keith-Gava Co.*, 203 Fed. 585, citing *Mach v. Bank*, 107 Fed. 897; *Martin v. Orgain*, 174 Fed. 772; *Re Gerson*, 105 Fed. 891; *Re Orne*, 12 Fed. 779; *Re Smith*, 146 Fed. 923; *Re Pittsburg Drug Co.*, 164 Fed. 482; *Re Dunlap Co.*, 163 Fed. 541; *Re Caloris Co.*, 179 Fed. 722; *Wilson v. Trust Co.*, 114 Fed. 742; *Re Winfield Co.*, 140 Fed. 185.

<sup>768</sup> *Re Roth*, 181 Fed. 667; *Shapiro v. Thompson*, 160 Ala. 363; *Re Callignan*, 4 A. B. R. 250.

In states where the claim of the landlord is entitled to priority, it is held that if he retakes possession on bankruptcy, his priority cannot be enforced. *Re Keith-Gara Co.*, 203 Fed. 585; *Wilson v. Trust Co.*, 114 Fed. 742; *Re Hunick*, 200 Fed. 50; *Re Winfield Mfg. Co.*, 137 Fed. 984.

<sup>769</sup> *Re Clancy*, 10 N. B. R. 215. *Cp. Re Orne*, 2 Woods, 779.

<sup>770</sup> *Wylie v. Breck*, 2 Woods, 673.

<sup>771</sup> *Re Bowne & Ten Eyck*, 12 N. B. R. 529.

<sup>772</sup> *E. g., Miss.*, *Austin v. O'Reilly*, 12 N. B. R. 329; *N. J.*, *Re Hoagland*, 18 N. B. R. 530; *Re McConnell*, 9 N. B. R. 387.

For lien decisions, see *Cent. Dig., Bkcy*, § 290.

<sup>773</sup> *Re Wynne*, 4 N. B. R. 5 (Va.).

<sup>774</sup> *Re Hoagland*, 18 N. B. R. 530.

<sup>775</sup> *Re Bowne*, 12 N. B. R. 529; *Re Clancy*, 10 N. B. R. 215; *Re Scruggs*, 205 Fed. 673; *Martin v. Orgain*, 174 Fed. 772; *Re Gallacher Coal Co.*, 205 Fed. 183; *Re Meyer*, 195 Fed. 653; *Denechaud v. Tulane Fund*, 200 Fed. 1022.

<sup>776</sup> *Re McConnell*, 9 N. B. R. 387.

And, on the other hand, although the tenant has executed notes for the rent accruing after adjudication, the lessor is not entitled to prove therefor.<sup>777</sup>

Of course, if there has been a surrender of the term, which has been accepted by the landlord, there can be no proof for rent due thereafter.<sup>778</sup> But, where the tenant asks the landlord to relet the premises and agrees to be responsible until they are relet, the landlord may prove for rent due until the date of reletting.<sup>779</sup> Where a lessee has assigned or sublet, the landlord may prove against the estate of the assignee or sublessee.<sup>780</sup>

To prove for any amount, the landlord must act promptly, and not wait until the estate has been distributed before presenting his claim.<sup>781</sup> Where a lessor got a sum for extending the lease, but the lessee became bankrupt before the extension began to run, it was held that the lessor should account to the estate for the sum received.<sup>782</sup>

In proving for rent under a written lease the latter should be filed with the proof of claim under § 57b.<sup>783</sup>

§ 328. **Proof of rent as damages.**<sup>784</sup>—Where the landlord reenters and re-lets to other parties, under a provision of the lease that he may do so, he is not entitled to prove his damages for breach of covenant by the lessee.<sup>785</sup> Nor, where he has a lien, can he assert it for rent thereafter.<sup>786</sup>

So, where the covenant is that the landlord may reenter and the tenant shall be liable for damages on account of the

<sup>777</sup> *Re Hays*, 117 Fed. Rep. 879.

<sup>778</sup> *Re Orne*, 12 Fed. Rep. 779, 781; *Rosenblum v. Uber*, 256 Fed. 584.

<sup>779</sup> *Re Bruce*, 6 Ben. 515.

<sup>780</sup> *Wylie v. Breck*, 2 Woods, 673; *Withcrow v. Southside Trust Co.*, 181 Fed. 753.

<sup>781</sup> *Re Empire Construction Co.*, 157 Fed. 495.

<sup>782</sup> *Re Abrams*, 200 Fed. 1005.

<sup>783</sup> *Re Keller*, 252 Fed. 942.

<sup>784</sup> As to damages under the state insolvent law formerly, see *Abbott v. Stearns*, 139 Mass. 168, 171, which also discusses the English act of 1869.

<sup>785</sup> *Ex parte Houghton*, 1 Lowell, 554; *Re Lake*, 2 Lowell, 544; *Re Ella*, 98 Fed. 967 (D. C. Mass.); *Re Arnstein*, 101 Fed. 706; *Re Croney*, 8 Ben. 64; *Re Hufnagel*, 12 N. B. R. 554; *Re Roth*, 174 Fed. 64; *Watson v. Merrill*, 136 Fed. 359; *Slocum v. Soliday*, 183 Fed. 410. *Contra*, *Re Orne*, 12 Fed. 779. In *Re Caloris Mfg. Co.*, 179 Fed. 722, it was said that where such a claim became liquidated within a year it could be proved under § 63 a (4).

<sup>786</sup> *Re Gallacher Coal Co.*, 205 Fed. 183; *Re Desmond*, 198 Fed. 581; *Solomon v. Eggleston*, 204 Fed. 1006.

premises remaining unleased or leased at a lower rent for the remainder of the term, the lessor cannot prove his damages for the breach of the covenant; for the liability is contingent not only upon reëntry but upon there being a loss, and the latter could not be ascertained until the end of the term or until a reletting at a reduced rent.<sup>787</sup>

So, when there has been an actual reëntry amounting to an eviction, no rent is due thereafter and there are no damages to be proved.<sup>788</sup> So, the landlord cannot prove for damages caused by the lessee abandoning the premises which were afterward burned.<sup>789</sup>

On the other hand, where a lessee became insolvent and a receiver was appointed and afterward the lessee went into bankruptcy, it was held that the lessor could prove for the difference between the rent stipulated in the lease and that actually paid by the receiver, this being a liquidated sum.<sup>790</sup>

§ 329. **Proof of damages for breach of other agreements.**—A claim for damages for breach of an agreement to take a lease is provable in bankruptcy;<sup>791</sup> as the obligation was incurred by the repudiation of the lease, and this was prior to the filing of the petition; and the matter is not like a proof of rent accruing after the bankruptcy of a tenant.<sup>792</sup> Where a lease provides that the tenant may make alterations, and shall restore the premises to their former condition at the end of the lease, the landlord cannot prove for the cost of restoration, as such a clause contemplates the ending of the lease by expiration and not by reëntry.<sup>793</sup> Nor is a claim provable for damages for

<sup>787</sup> *Re Shaffer*, 124 Fed. Rep. 111 (D. C. Mass.); *Re Ells*, 98 Fed. Rep. 967 (D. C. Mass.); *Ex parte Lake*, 2 Lowell, 544; *Re Roth & Appel*, 181 Fed. 667.

*Cf. Re Mullins Clothing Co.*, 230 Fed. 681, holding that the difference between the rent reserved and that to be paid by a new tenant was really rent through called damages.

<sup>788</sup> *Ex parte Houghton*, 1 Lowell, 554. The provision that such termination and reëntry shall not prejudice any remedy for arrears of rent or for preceding breach of covenant, does not affect the result. *Re Orne*, 12 Fed. Rep. 779, 781.

<sup>789</sup> *Winfee v. Jones*, 104 Va. 39.

<sup>790</sup> *Re Mullins Clothing Co.*, 252 Fed. 667.

<sup>791</sup> *Re Mullins Clothing Co.*, 238 Fed. 58.

<sup>792</sup> *Ibid.*

<sup>793</sup> *Re Arnstein*, 101 Fed. Rep. 706. *Cp. Re O'Malley & Glynn*, 191 Fed. 999.



wrongfully abandoning a house, so that it was burned down.<sup>794</sup> Nor a claim based on the fact that the tenant had agreed to make certain improvements at his own expense, and at the time of his bankruptcy had not fully paid for them, in consequence of which the contractor had filed a lien.<sup>795</sup>

It is no defence to an action by an assignee in bankruptcy of a tenant of a farm against the landlord, for the conversion of crops, that the tenant had abandoned the farm before the expiration of the lease; nor is the assignee bound to assume and perform the conditions of the lease. The landlord's remedy for the breach of the lease is by proving his claim for damages against the bankrupt's estate.<sup>796</sup>

Where a bankrupt makes a common law assignment which includes a lease containing a clause against assignment, and the lessor accepts rent from the assignee, he cannot prove a claim for breach of condition.<sup>797</sup>

§ 329a. **Priority claims.**<sup>798</sup>—Section 64a of the act, gives priority to taxes owing by the bankrupt. This does not entitle a landlord, when the lease requires the tenant to pay the taxes, to priority of his claim when he has been obliged to pay them himself.<sup>799</sup>

Where a tenant owed his landlord for rent and also on other transactions, an indebtedness of the landlord may be set off against such other indebtedness of the tenant, although the effect is to leave a larger claim for rent, which is entitled to priority.<sup>800</sup>

Where a lease provides that the rent for the whole term shall become due and payable upon the bankruptcy of the tenant, nevertheless the priority extends only to rent due at the date of the adjudication.<sup>801</sup>

Where a landlord before the expiration of an earlier lease to a tenant who was indebted for rent, demises to the bankrupt by a lease providing that it shall not affect the former lease or the

<sup>794</sup> *Winfree v. Jones*, 51 S. E. Rep. 153 (Va.).

<sup>795</sup> *Re O'Malley & Glynn*, 191 Fed. 999.

<sup>796</sup> *Griswold v. Morse*, 59 N. H. 211.

<sup>797</sup> *Ratchesky v. Whiting*, 251 Fed. 268 (Mass.).

<sup>798</sup> See Black, Bankruptcy, § 633.

<sup>799</sup> *Re Harris Engine Co.*, 225 Fed. 609; *Re Spiers-Alper Co.*, 231 Fed. 535.

<sup>800</sup> *Re Bell Engraving Co.*, 214 Fed. 510.

<sup>801</sup> *Re Abrams*, 200 Fed. 1005; *Re Jefferson*, 93 Fed. 948. *Cp. Re Keith & Gava Co.*, 203 Fed. 585; *Ludlow v. Pugh*, 213 Fed. 450.



remedies for collection of rent, and the bankrupt takes over the business and property of the first tenant in the premises, the claim of the landlord against the first tenant is not entitled to priority against the estate of the bankrupt.<sup>802</sup>

§ 329b. **Discharge of tenant.**<sup>803</sup>—Where a tenant who was bankrupt transferred his leases of certain profitable stores to a corporation of which he held all the stock, intending to break the leases on the other stores which were unprofitable; and, after the appointment of the trustee, transferred to him the stock in the corporation, it was held that the whole transaction was fraudulent and a bar to the tenant's discharge.<sup>804</sup>

§ 330. **Effect of tenant's discharge.**—If the lease is not already terminated by the adjudication,<sup>805</sup> the discharge of the bankrupt does not terminate it.<sup>806</sup>

A discharge of a lessee in bankruptcy bars claims for rent accruing prior to the discharge, but not for rent falling due after the discharge, although part of the occupation was prior thereto.<sup>807</sup> The discharge does not bar a claim under a personal covenant in a trust deed, which could not have been proved in the bankruptcy proceedings.<sup>808</sup>

Nor does it bar a claim not provable, such as rent accruing after the lessee has been adjudicated as bankrupt.<sup>809</sup> In such a case the sureties on a rent note are not released.<sup>810</sup>

Where a landlord holds security for certain debts of the tenant, the burden is upon him to show that these debts were not unliquidated and therefore discharged by the bankruptcy, but that they are still valid claims.<sup>811</sup>

<sup>802</sup> *Re West*, 253 Fed. 963.

<sup>803</sup> Black on Bankruptcy, §§ 662-717.

<sup>804</sup> *Re Braus*, 237 Fed. 139.

<sup>805</sup> As to which, see *supra*, § 322.

<sup>806</sup> *Withans v. Zimmerman*, 91 App. Div. (N. Y.) 202, 86 N. Y. S. 315.

<sup>807</sup> *Savory v. Stocking*, 4 Cush. 607; *Treadwell v. Marden*, 18 N. B. R. 353 (Mass.); *Ex parte Houghton*, 1 Lowell, 554; *Bosler v. Kuhn*, 8 Watts & S. (Pa.) 183.

The same was true under the state composition act (G. L., c. 216, §§ 157-159; R. L., c. 163, §§ 157-159; St. 1884, c. 236, §§ 9, 10; St. 1890, c. 387). *Mason v. Clough*, 155 Mass. 389.

<sup>808</sup> *Murray v. De Rottenham*, 6 Johns. Ch. (N. Y.) 52 (covenant to pay taxes). *Cp. French v. Morse*, 2 Gray, 111 (covenant against incumbrances).

<sup>809</sup> See *supra*, § 324; *Scott v. Demarest*, 75 Misc. Rep. (N. Y.) 289.

<sup>810</sup> *Re Curtis*, 109 La. 171.

<sup>811</sup> *Kellogg v. King*, 75 So. Rep. 134.

§ 331. **Bankruptcy of lessor.**—If the lessor becomes bankrupt, his right to receive the rents passes to his trustee,<sup>812</sup> but it passes subject to any equities which the lessor may have imposed upon it. Therefore an assignment of the lease with a power of attorney to collect rents executed by the lessor is binding upon the trustee in bankruptcy.<sup>813</sup> Similarly, where one to whom the lessor was indebted agreed to pay for the temporary use of the latter's mill, it was held that this rent not being a debt created for the purpose of creating a set-off, the tenant was entitled to so use it.<sup>814</sup>

And an agreement to pay to A, unless obliged to pay to the trustee, has been held not to be in violation of the bankruptcy act.<sup>815</sup> But an oral agreement by a third person with the bankrupt, before bankruptcy proceedings, that the bankrupt should collect the rents and pay them to such third person, until he should be reimbursed for money advanced to pay for taxes and steam heat, creates no lien upon the rents as against the trustee.<sup>816</sup>

In case of property mortgaged by the bankrupt of which he was in possession at the time of the bankruptcy, the trustee is entitled to the rents accruing after adjudication and before the mortgagee forecloses.<sup>817</sup> In such a case, if the mortgagor had agreed to collect rents and apply them upon the mortgage debt, yet this did not make him the agent of the mortgagee to collect the rents or give the latter title to rents uncollected at the time of adjudication.<sup>818</sup>

Where land was sold on execution to B, who leased it to C, and the sale was subsequently declared invalid, it was held that the trustee in bankruptcy of A, subsequently appointed, could properly ratify such lease as against A.<sup>819</sup>

Prospective profits of business cannot be proved by the lessee against the lessor's estate as damages for refusal to allow the

<sup>812</sup> *Hunter v. Hays*, 7 Biss. 362; *Elmore v. Symonds*, 183 Mass. 321; *Re Dale*, 110 Fed. 926; *Keenan v. Shannan*, 9 N. B. R. 441. See *Gray v. Chase*, 184 Mass. 444.

<sup>813</sup> *Meador v. Everett*, 3 Dill. 214; s. c., 10 N. B. R. 421.

<sup>814</sup> *Clifford v. Oak Valley Mills Co.*, 229 Fed. 851 (Mass.).

<sup>815</sup> *Re Chalmers*, 98 Fed. Rep. 865.

<sup>816</sup> *Elmore v. Symonds*, 183 Mass. 231.

<sup>817</sup> *Re Dale*, 110 Fed. Rep. 926; *Re Brose*, 254 Fed. 690.

<sup>818</sup> *Ibid.*

<sup>819</sup> *Re Throckmorton*, 149 Fed. Rep. 145.

further occupation of leased premises except at a higher rate than that agreed upon.<sup>820</sup>

The lessee is not entitled to prove damages for the breach of a covenant for quiet enjoyment because of the lessor's being adjudicated a bankrupt and an eviction of the lessee thereafter by a superior lessor.<sup>821</sup> Nor does the adjudication in bankruptcy of a lessee operate of itself to terminate his lease and end his estate, so as to give his sublessee a claim for damages which can be proved as a debt against his estate.<sup>822</sup>

§ 332. **Effect of sale of premises by trustee.**—Where the bankrupt continues to occupy after the estate is sold by the assignee to a purchaser, and the latter agrees with the tenant, that the tenant shall vacate on a certain day, the bankrupt is tenant to the purchaser and not to the assignee, and the assignee is not bound to keep possession ready for the purchaser.<sup>823</sup> The right to receive rents falling due after the date of the sale passes to the purchaser;<sup>824</sup> but a sale of the reversion free from encumbrances does not pass to the purchaser the right of the bankrupt to remove any portion of the crops growing on the premises which was to be paid him by way of rent.<sup>825</sup> Nor does the filing of a bill for the sale of property free from encumbrances give a mortgagee a right to the rents thereafter collected; but the filing of a petition in the bankruptcy court and notice thereof to the assignee is a sufficient claim by the mortgagee.<sup>826</sup>

§ 333. **Appointment of receivers—In bankruptcy.**—A receiver is not invested with the title of the bankrupt; but is a mere custodian whose duty is to preserve the property until the appointment of a trustee.<sup>827</sup> His authority dates from the entry of the decree appointing him.<sup>828</sup> He has the right to use leased premises of the bankrupt for a reasonable period, sufficient to enable him to dispose of the bankrupt's property

<sup>820</sup> *Re Leland*, 8 Ben. 254.

<sup>821</sup> *Re Pennewell*, 119 Fed. Rep. 139.

<sup>822</sup> *Ibid.*

<sup>823</sup> *Re Hale*, 19 N. B. R. 330.

<sup>824</sup> *Hall v. Scovel*, 10 N. B. R. 295.

<sup>825</sup> *Re Bledsoe*, 12 N. B. R. 402.

<sup>826</sup> *Re Bennett*, 12 N. B. R. 257. *Cp. Re Ketterer Mfg. Co.*, 162 Fed. 583.

<sup>827</sup> As to receivers, see Black on Bankruptcy, §§ 211-217. *Re Rubel*, 166 Fed. 131.

<sup>828</sup> *Re Alton Manuf. Co.*, 158 Fed. 367.

without unnecessary loss; but such use is not an adoption of the lease.<sup>829</sup>

A receiver occupying a leasehold is liable to pay a fair compensation for its use.<sup>830</sup>

This compensation is not necessarily that reserved in the lease; but evidence of the rent previously paid, either under a lease or a verbal agreement, may be of assistance in determining what is a fair rate.<sup>831</sup> In exceptional cases, more than the rent reserved may be allowed.<sup>832</sup> The fair rental value is the determining factor in the amount to be paid; and the amount of business transacted by the receivers during occupation has no bearing on the question.<sup>833</sup>

This claim for compensation is part of the expenses under § 64 of the Act, and is preferred to the claims of general creditors.<sup>834</sup>

Where a receiver continues in occupation of premises until an adjudication of bankruptcy, the landlord is entitled to prove for rent until that time, as a debt founded upon express contract.<sup>835</sup> But he cannot complain that his general claim for rent is apportioned, so as to make a part of it a claim against the estate of the bankrupt, and part a claim against the receiver at the same rate.<sup>836</sup>

<sup>829</sup> *Re Crawford Plummer Co.*, 253 Fed. 76; *Re Rubel*, 166 Fed. 131, 170 Fed. 1021.

<sup>830</sup> *Gardner v. Gleason*, 259 Fed. 775 (C. C. A. Mass.); *Re Crawford Plummer Co.*, 253 Fed. 76; *Re Chalmers*, 98 Fed. 865; *Re Adams Cloak Co.*, 199 Fed. 337; *Fleming v. Noble*, 250 Fed. 733; *Re Hinckel Brewing Co.*, 123 Fed. 942; *Re Youdelman-Walsh Foundry Co.*, 166 Fed. 381.

As to when the receiver is liable personally, see *Alexis v. Koehler*, 119 N. Y. S. 664.

As to laches of the landlord in asserting his claim, see *Re Hinckel Brewing Co.*, 123 Fed. 942.

<sup>831</sup> *Gardner v. Gleason*, 259 Fed. 755.

<sup>832</sup> *Re Adams, Cloak, etc., House*, 199 Fed. 337; *Re Grignard, etc., Co.*, 155 Fed. 699, 158 Fed. 557.

<sup>833</sup> *Gardner v. Gleason*, 259 Fed. 755 (C. C. A. Mass.); *Kneeland v. Am. Loan & Trust Co.*, 136 U. S. 89, 103.

<sup>834</sup> *Re Grignard Lithographing Co.*, 158 Fed. 557; *Gardner v. Gleason*, 259 Fed. 755 (C. C. A. Mass.); *Randolph v. Scruggs*, 190 U. S. 533, 538.

<sup>835</sup> *Re Hinckel Brewing Co.*, 123 Fed. Rep. 942; *Re Adams Cloak, etc., House*, 199 Fed. 337; *Re Grignard Lithographing Co.*, 158 Fed. 557.

<sup>836</sup> *Re Kelly Dry Goods Co.*, 102 Fed. Rep. 747.

The receiver is not bound to assume a lease unless it is for the benefit of the creditors.<sup>837</sup>

But, if he rejects it, a trustee in bankruptcy, subsequently appointed, is not bound by his rejection, as the trustee is entitled to all the assets of the bankrupt.<sup>838</sup>

However, the receiver stands in the shoes of the bankrupt; and therefore, where the tenant under a lease to begin in the future was to have the premises rent free meanwhile, the lessor cannot claim compensation from the receiver for such period.<sup>839</sup>

A receiver, like a trustee is not bound to assume a lease unless it is for the benefit of creditors.<sup>840</sup> He is liable to an action without leave of court for any damage to the estate during his occupation, such as the severance and removal of fixtures.<sup>841</sup>

Proceedings by the lessor to oust a receiver will be enjoined where ouster would seriously interfere with the administration of the estate.<sup>842</sup>

Although the title of the trustee when appointed relates back to the filing of the petition, yet a receiver may be authorized by the court to sell the leasehold.<sup>843</sup>

Where a mortgage provides that the mortgagee may enter upon default and receive the rents, a receiver of the mortgagor is entitled to receive the rent before foreclosure.<sup>844</sup>

Leave of court to sue is not necessary for the landlord to bring action where fixtures have been removed during the occupation of a receiver,<sup>845</sup> but where the receiver does not become a tenant under the lease the landlord's claim against the estate, for unpaid taxes and water rates, must be established by proof before the referee as a general claim.<sup>846</sup>

The landlord is not obliged to protest to a receiver in order to protect his right of action against a tenant for breach of covenant.<sup>847</sup> If he wishes to have the receiver vacate the prem-

<sup>837</sup> *Re Chalmers*, 98 Fed. Rep. 865; *Re Mullins Clothing Co.*, 238 Fed. 58.

<sup>838</sup> *Re Mullins Clothing Co.*, 238 Fed. 58.

<sup>839</sup> *Re Budd*, 239 Fed. 307.

<sup>840</sup> *Re Chalmers*, 98 Fed. 865. *Cp. File Co. v. Gassett*, 110 U. S. 288.

<sup>841</sup> *Re Kelly Dry Goods Co.*, 102 Fed. 747.

<sup>842</sup> *File Co. v. Gassett*, 110 U. S. 288; *Re Chalmers*, 98 Fed. 865.

<sup>843</sup> *Re Sherwoods*, 210 Fed. 754.

<sup>844</sup> *Re Brose*, 254 Fed. 690.

<sup>845</sup> *Re Kelly Dry Goods Co.*, 102 Fed. 747.

<sup>846</sup> *Re Youdelman-Walsh Foundry Co.*, 166 Fed. 381.

<sup>847</sup> *Re Mullins Clothing Co.*, 238 Fed. 58.

ises and the goods of the bankrupt removed, his proper course is to petition the bankruptcy court.<sup>848</sup>

§ 333a. By state courts.—A receiver of an insolvent corporation is not an assignee of the term even though he take possession. He is liable therefore only for a reasonable sum for use and occupation during such time as he retains possession, and is not liable on the covenants of the lease.<sup>849</sup>

Nor is a receiver of the lessor's estate an assignee, and he must therefore sue for accrued rent in the name of the lessor.<sup>850</sup> In a case in New York where a lessor, in accordance with the terms of the lease, reentered and relet the premises for the unexpired term at a lower rate, it was held that a receiver of the insolvent lessee might recognize the claim of the lessor for the difference in rental.<sup>851</sup>

Where the lessor has reentered during the receivership, he has a proper claim for rent up to the reentry and for damages based upon the lessee's covenant to pay the difference between the rental value at the time of reentry and the rent and other payments reserved for the residue of the term.<sup>852</sup> But, in the absence of express contract, he has no further claim against the lessee after the reentry and hence none against the lessee's receiver, in a proceeding in equity to continue the lessee's business for the purpose of paying his debts.<sup>853</sup>

An adjudication of bankruptcy terminates the authority of a receiver appointed by a state court;<sup>854</sup> but the receiver

<sup>848</sup> *Re Kleinhaus*, 113 Fed. 407.

<sup>849</sup> *Bell v. American Protective League*, 163 Mass. 558. *Cp. Pfister & Vogel Co. v. Fitzpatrick Shoe Co.*, 197 Mass. 277.

In *Commonwealth v. Franklin Ins. Co.*, 115 Mass. 278, 281, there was a special contract between the receiver and the lessor, so that the question did not really arise. See, generally, Hall on Mass. Business Corporations, 3d ed., 360-376.

<sup>850</sup> *Noble v. Brooks*, 224 Mass. 288, 292. Where he has sued in his own name he may amend under St. 1913, c. 716, § 3. *Ibid.* See G. L., c. 231, § 125.

<sup>851</sup> *People v. St. Nicholas Bank*, 151 N. Y. 592.

<sup>852</sup> *Gardner v. Butler & Co.*, 245 U. S. 603; *File's Sons Co. v. Weed*, 245 U. S. 597.

<sup>853</sup> *Gardner v. Butler & Co.*, 245 U. S. 603.

<sup>854</sup> *Re Watts*, 190 U. S. 1; *Gealey v. South Side Trust Co.*, 249 Fed. 189; *Shannon v. Shepard Manuf. Co., Inc.*, 230 Mass. 224.

has no power to surrender the property of the insolvent except to the bankruptcy court,<sup>855</sup> and the state court has the power to settle the accounts of the receiver up to the time of adjudication, and to determine his compensation and expenses.<sup>856</sup>

<sup>855</sup> *Gealey v. South Side Trust Co.*, 249 Fed. 189.

<sup>856</sup> *Shannon v. Shepard Manuf. Co., Inc.*, 230 Mass. 224.

## CHAPTER VII

### RELATION TO THIRD PARTIES

#### SECTION I

##### LIABILITY TO THIRD PARTIES<sup>1</sup>

§ 334. **Liability for injuries.—In general.**—It is not the purpose of this chapter to discuss the rights and liabilities of the owners or occupiers of land as such, but only the division of such rights and liabilities between landlords and tenants.

As between landlord and tenant, the question as to who is liable for injuries occasioned by defects in the premises usually depends upon who is in control. If the defect is due to the tenant, it is obvious he cannot recover against the landlord.

In precisely the same way, the liability to a third person who is injured upon the premises, as between landlord and tenant, depends upon which of them is in control of the premises. In general the tenant is in control and not the landlord; but, in particular cases, as we shall see, the rule is otherwise.<sup>2</sup>

The fact that there is a covenant in the lease providing that the lessor or lessee shall be liable for injuries, does not affect the right of an injured party to sue the negligent person in control.<sup>3</sup>

When a statute requires a certain notice of an injury as a condition precedent to enforcing liability, such a notice given to the landlord is of no validity as against the tenant;<sup>4</sup> and it

<sup>1</sup> As to the attachment of leaseholds, see Hall on Examination of Land Titles, § 4.

<sup>2</sup> As to defects in property see also *supra*, §§ 187–196.

As to liability to the family, employees and visitors of the tenant, see *supra*, § 188.

As to contracts respecting liability, see *supra*, § 101, and *infra*, §§ 335, 336.

As to injuries from ice and snow, see *infra*, §§ 342–343.

<sup>3</sup> *Maran v. Peabody*, 228 Mass. 432, 435; *Follins v. Dill*, 221 Mass. 93, 98; *Cussen v. Weeks*, 232 Mass. 563. *Cp. supra*, § 101.

<sup>4</sup> *Sweet v. Pecker*, 223 Mass. 286. *Cf. G. L., c. 84, §§ 18–20; R. L., c. 51, §§ 20–22 and infra, § 342a.*



must be given in the manner, and within the time, prescribed by the statute.<sup>5</sup>

§ 335. **Tenant prima facie liable.**—On the principle that the party in control of premises is the one liable for personal injuries sustained thereon by third persons, the general rule is that the tenant as occupier is the one *prima facie* liable, as he is *prima facie* in control.<sup>6</sup>

“But by ‘occupier’ is meant not merely the person who physically occupies the building, but the person who occupies it as a tenant, having the control of it, and being as to the public under the duty of keeping it in repair. If the control and duty of keeping it in repair remain upon the owner, he is responsible for defects.”<sup>7</sup> Thus if B holds an assignment of a lease of ice sheds, and pays men and delivers ice from the sheds to customers, the fact that A, under contract with B,

<sup>5</sup> *Baird v. Baptist Society*, 208 Mass. 29; *McNamara v. Boston & Maine Railroad*, 216 Mass. 506.

<sup>6</sup> *Cunningham v. Cambridge Savings Bank*, 138 Mass. 480, per Morton, C. J.; *Kirby v. Boylston Market Association*, 14 Gray, 249; *Milford v. Holbrook*, 9 Allen, 17, 21; *Lowell v. Spaulding*, 4 Cush. 277; *Oakham v. Holbrook*, 11 Cush. 299; *Leonard v. Storer*, 115 Mass. 86; *Larue v. Farren Hotel Co.*, 116 Mass. 67; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47; *Boston v. Gray*, 144 Mass. 53, 55; *Stewart v. Putnam*, 127 Mass. 403; *Hutchinson v. Cummings*, 156 Mass. 329; *McLean v. Fiske Wharf, etc., Co.*, 158 Mass. 472; *Szathmary v. Adams*, 166 Mass. 145; *Poor v. Sears*, 154 Mass. 539; *Learoyd v. Godfrey*, 138 Mass. 315; *Marwedel v. Cook*, 154 Mass. 235 (defective lighting of common stairs); *Commonwealth v. Watson*, 97 Mass. 562, 564; *Fiske v. Framingham Mfg. Co.*, 14 Pick. 491; *Maloney v. Hayes*, 206 Mass. 1 (defective water conductor); *Gardner v. Copley-Plaza Operating Co.*, 220 Mass. 372 (elevator); *Green v. Carigiano*, 217 Mass. 1; *Gunning v. King*, 229 Mass. 117 (coal hole); *Stefani v. Freshman*, 232 Mass. 354 (ice and snow); *Conahan v. Fisher*, 233 Mass. 234, 237; *Schena v. Bacigalupo*, 233 Mass. 126 (defect in floor).

*Cp. Hanlon v. Thompson*, 167 Mass. 190 (defective floor); *Churchill v. Holt*, 127 Mass. 165 (hatchway); s. c., 131 Mass. 67; *Frischberg v. Hurter*, 173 Mass. 22; *Munroe v. Carlisle*, 176 Mass. 199; *Kirk v. Sturdy*, 187 Mass. 87; *Rice v. Boston University*, 191 Mass. 30; *Clapp v. Donaldson*, 195 Mass. 39.

As to Defects in Property, see also *supra*, §§ 187–196.

As to injuries from ice and snow, see also *infra*, §§ 73, 342.

<sup>7</sup> *Cunningham v. Cambridge Savings Banks*, 138 Mass. 480, per Morton, C. J.; *Ahern v. State*, 115 N. Y. 203; also *infra* in this section. See generally “Responsibility for the Condition of Demised Premises,” Joseph Willard, 6 Am. Law Rev., 626–638 (1872).

fills the sheds and hires the men, will not prevent B's being an occupier of the premises.<sup>8</sup> And where A, being a lessee, assigns his lease to B, who enters into possession and employs a janitor, the latter is the servant of B and A is not liable for his conduct.<sup>9</sup> On the other hand, where a building is let to two tenants, each having apparently separate and exclusive control of their respective frontage, the owner occupying rooms as a boarder with one of the tenants is not liable for the removal of snow from the sidewalk.<sup>10</sup>

The tenant, however, is liable only for injuries caused by defects in the part of the premises leased to him. Thus, a tenant of the roof of a building is not liable for an injury caused by the fall of a part of the capping of a party wall which was not a part of the roof.<sup>11</sup>

When the landowner has given up entire control of premises to a lessee, "this court has never gone further than to hold him liable when the use from which the damage or nuisance necessarily ensues was plainly contemplated by the lease."<sup>12</sup> And a mere consent by the lessor to the erection of an addition by the lessee does not impose any liability upon him.<sup>13</sup> Nor does the fact that the lease is for twenty years and not recorded.<sup>14</sup>

A landlord may, indeed, intrust the tenant with the care and control of property in such a way as to be affected by the negligence of the tenant.<sup>15</sup> But the fact that a sign is put up by authority of a tenant at will, without the knowledge of the owner, cannot make the latter liable for any invitation to enter caused by the sign being placed where it was.<sup>16</sup> Where a lessee enters intending to occupy the demised premises, and occupies land of another which the lessor never made claim to or possessed, and which was not included in the

<sup>8</sup> *Hanlon v. Thompson*, 167 Mass. 190.

<sup>9</sup> *Falardeau v. Boston Art Students' Association*, 182 Mass. 405.

<sup>10</sup> *Commonwealth v. Watson*, 97 Mass. 562; *Burt v. Boston*, 122 Mass. 223.

<sup>11</sup> *Yorra v. Lynch*, 226 Mass. 153 (here the plaintiff was the son of another tenant).

<sup>12</sup> *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 49; *Taylor v. Loring*, 201 Mass. 283, 285; *Stone v. Lewis*, 215 Mass. 594, 596; *Dickie v. Davis*, 217 Mass. 25.

<sup>13</sup> *Dickie v. Davis*, 217 Mass. 25, 28.

<sup>14</sup> *Cerchione v. Hunnewell*, 215 Mass. 588.

<sup>15</sup> *Bartlett v. Boston Gas Light Co.*, 117 Mass. 533. See *infra*, § 340.

<sup>16</sup> *Mistler v. O'Grady*, 132 Mass. 139.

lease, his possession is not that of the lessor so as to enable the latter to make a disseisin of the premises.<sup>17</sup>

A mere agent or licensee in occupation is not liable for injuries occasioned by defects in the premises;<sup>18</sup> but the fact that, in a contract, one is termed an "agent" rather than a tenant is not enough to do away with the legal result of the stipulations of the agreement.<sup>19</sup> Where, however, a tenant under a lease entered into an agreement whereby his lease was surrendered, but he was kept in occupation and control of all of a building not leased to subtenants, and had general control of the building for purposes of heating, lighting, care, and the collection of rents, it was held that he was virtually a tenant.<sup>20</sup> There is a special rule in the case of street railway and steam railroad companies, making the lessor responsible for injuries, in spite of the fact that it has leased its property and franchise. This rule rests on the principle that the corporation shall not relieve itself of the responsibility imposed by its charter through a lease.<sup>21</sup>

If a lessee is obliged to pay damages under the employers' liability act, his remedy over, if any, against the landlord is at common law.<sup>22</sup>

The tenant may be sued alone or jointly with the landlord, because, in an action of tort, nonjoinder of the other tort feorsors is no defence.<sup>23</sup> But if judgment is taken against less than all the defendants, it is a discontinuance as to the others.

Where a statute requires a notice of injury before bringing suit, and the plaintiff has given notice only to the landlord

<sup>17</sup> *Holmes v. Turner's Falls Co.*, 150 Mass. 535. See *supra*, § 37.

<sup>18</sup> *Cunningham v. Cambridge Savings Bank*, 138 Mass. 480, 481. *Cp. Oxford v. Leathe*, 165 Mass. 254.

<sup>19</sup> *Stewart v. Putnam*, 127 Mass. 403.

<sup>20</sup> *Ibid.*

<sup>21</sup> G. L., c. 161, § 62; R. L., c. 112, § 85; Pub. St. c., 113, § 56; St. 1871, c. 381, § 31; St. 1906, c. 463, § 51. *Braslin v. Somerville Horse Railroad*, 145 Mass. 64; *Richardson v. Sibley*, 11 Allen, 65; *Middlesex Railroad v. Boston & Chelsea Railroad*, 115 Mass. 347; *Quested v. Newburyport Horse Railroad*, 127 Mass. 205; *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; *McCluer v. Manchester & Lawrence R. R. Co.*, 13 Gray, 124; *Clemens Electrical Mfg. Co. v. Walton*, 173 Mass. 286, 298. See *supra*, § 24.

<sup>22</sup> *Consolidated Machine Co. v. Bradley*, 171 Mass. 127.

<sup>23</sup> *Munroe v. Carlisle*, 176 Mass. 199, 201; *Dickie v. Davis*, 217 Mass. 25. See also *infra*, § 336.

and before trial discontinues against him, he cannot proceed against the tenant.<sup>24</sup>

It may happen that the third party is another tenant. Thus where a sprinkler system was installed by the landlord, and the tenant of an upper floor made certain alterations, and the sprinkler system broke and flooded a lower tenant's premises, it was held to be a question of fact whether there was negligence and whether the negligence was that of the upper tenant.<sup>25</sup>

Where the plaintiff brings an action as tenant against the landlord, for personal injuries caused by a defect in the floor of a passageway, and there is no evidence as to who caused the alleged defect, nor how long it existed, nor whose tenant the plaintiff was, nor the terms of the tenancy, a verdict should be ordered for the defendant.<sup>26</sup> A tenant, like a landlord, is not liable to mere trespassers or licensees for injuries occasioned by the acts of his servant, in the absence of wilful wrong.<sup>27</sup>

To hold the tenant liable, there must, of course, be evidence of negligence. Thus in a case where an accident occurred from the removal of a coal hole cover, and there is no evidence as to by whom and for what purpose it was removed, the tenant could not be held liable;<sup>28</sup> and the doctrine of *res ipsa loquitur* was held not to apply.<sup>29</sup>

§ 335a. Nuisances.—In accordance with the principle first stated above, if a nuisance is caused by the tenant in occupation, he, and not the landlord, is *prima facie* liable.<sup>30</sup> "It

<sup>24</sup> *Sweet v. Pecker*, 223 Mass. 286 (snow falling from building). See G. L., c. 84, §§ 18–20; R. L., c. 51, §§ 20–22.

<sup>25</sup> *Standard Tire & Rubber Co. v. Richardson & Bros.*, 231 Mass. 374. *Cp. infra*, § 355.

<sup>26</sup> *Schena v. Bacigalupo*, 233 Mass. 126.

<sup>27</sup> *McManus v. Thing*, 194 Mass. 362; s. c., 202 Mass. 11. *Cp. Walker v. Fuller*, 223 Mass. 566. In this case the servant of a subtenant, who was entitled to the exclusive use of an elevator while using it, injured a servant of the tenant, and it was held the latter had no right to be there and could not recover.

<sup>28</sup> *Gunning v. King*, 229 Mass. 177.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Shipley v. Fifty Associates*, 101 Mass. 251; s. c., 106 Mass. 194. *Cp. Lowell v. Spaulding*, 4 Cush. 277; *Saltonstall v. Banker*, 8 Gray, 195; *Lufkin v. Zane*, 157 Mass. 117; *Caldwell v. Slade*, 156 Mass. 84; *Salisbury v. Herchenroder*, 106 Mass. 458; *Coman v. Alles*, 198 Mass. 99; *Taylor v. Loring*, 201 Mass. 283; *Maloney v. Hayes*, 206 Mass. 1; *Cerchione v. Hunnewell*, 215 Mass. 588.

cannot matter whether the wrong on the part of the tenant is an act which makes the premises a nuisance, or an omission which allows them to become so. It is as much his duty to act in the latter case as it is to abstain in the former. In either, the landlord, unless he has assumed the duty himself by covenant, has a right to rely upon the tenant's managing the premises in his occupation in such a way as to prevent their being a nuisance."<sup>31</sup>

§ 335b. **Liability of tenant to his invitees.**—Where a woman, who was the guest of a lodge which had hired a hall for a meeting, was injured by the defective lighting of a hallway, in a case where the risk was assumed by the lodge as against the landlord, it was held an open question whether she could recover as against the lodge.<sup>32</sup>

A contractor and his workmen employed by the tenant are upon the premises by his invitation, and therefore entitled to have them kept in a reasonably safe condition;<sup>33</sup> but the invitation extends only to those portions of the premises necessary for the performance of the work and for access thereto,<sup>34</sup> and the lessee does not undertake to warn of possible defects and dangers in other portions.<sup>35</sup>

§ 336. **Landlord in control liable.**—Although parts of a building be leased to different tenants, yet if the obligation to repair rests upon the landlord and he has the control so as to be able to make the needed repairs, he will be liable, and not the tenants.<sup>36</sup>

<sup>31</sup> *Clifford v. Atlantic Mills*, 146 Mass. 47, 49, per Holmes, J.; *Stewart v. Putnam*, 127 Mass. 403; *Neas v. Lowell*, 193 Mass. 441. *Cp.* *Munroe v. Carlisle*, 176 Mass. 199; *Coman v. Alles*, 198 Mass. 99; *Taylor v. Loring*, 201 Mass. 283.

<sup>32</sup> *Jordon v. Sullivan*, 181 Mass. 348. *Cp.* *Coupe v. Platt*, 172 Mass. 458.

<sup>33</sup> *Dickie v. Davis*, 217 Mass. 25, 29. *Cf.* *Wright v. Perry*, 188 Mass. 268; *Plummer v. Dill*, 156 Mass. 426.

<sup>34</sup> *Dickie v. Davis*, 217 Mass. 25, 29.. *Cp.* *Walker v. Wistanley*, 155 Mass. 301; *Cowen v. Kirby*, 180 Mass. 504.

<sup>35</sup> *Dickie v. Davis*, 217 Mass. 25, 29.

<sup>36</sup> *Kirby v. Boylston Market Association*, 14 Gray, 249. *Cp.* *Shiple v. Fifty Associates*, 101 Mass. 251, s. c., 106 Mass. 194; *Larue v. Farren Hotel Co.*, 116 Mass. 67; *Learoyd v. Godfrey*, 138 Mass. 315; *Brewer v. Farnam*, 208 Mass. 448 (defective water conductor); *Marston v. Phipps*, 209 Mass. 552 (ice and snow); *McNamara v. Gillette Razor Co.*, 214 Mass. 163 (defective elevator); *Gilland v. Maynes*, 216 Mass. 581 (ice and snow); *Maran v. Peabody*, 228 Mass. 432 (defective lighting of stairs); *Connors v.*

"The general duty which the defendants [landlords] owed to third persons, in respect to passages of the building, is well expressed in the instructions to the jury at the trial: "If the defendants lease rooms in the building to different tenants, reserving to themselves the control of the halls, stairways and elevator,"<sup>37</sup> by and through which access was to be had to these rooms, and the general lighting arrangements of those passages, then the defendants were bound to take reasonable care that such approaches were safe and suitable at all times and for all persons who were lawfully using the premises, and using due care so far as they ought to have reasonably anticipated such use as involved in and necessarily arising out of the purposes and business for which said rooms were leased."<sup>38</sup> This liability of the landlord to the party injured is said to rest upon avoiding circuitry of action.<sup>39</sup>

So, in one case, it was claimed the sidewalk was dangerous from ice formed by water escaping from the gutters and conductors of the building owned by the defendant. He claimed that the tenants were the ones liable. The court said: "Although all the separate parts of their building, consisting of cellars, stalls and disconnected chambers, were leased either at will or for a term of years to many different tenants, yet the defendants had a general supervision over the whole, and had the entire control of the outside doors and outside passage-ways, so far as was necessary to enable them to make all necessary repairs; the obligation to do which rested exclusively on them. They also kept the key of the market room, and opened and closed the doors of it at fixed hours, conforming however, in respect to the time of doing it, to the wishes of the tenants. Under these circumstances there was no such occupancy by the tenants as would cast upon them the obligation of keeping the building in repair, or make them responsible to third persons for damage resulting from its defects; but the liability in that particular still continued to rest upon the owner."<sup>40</sup>

Richards, 230 Mass. 436 (ice from roof); Erickson v. Buckley, 230 Mass. 467 (icy steps).

<sup>37</sup> See Perkins v. Rice, 187 Mass. 28.

<sup>38</sup> Marwedel v. Cook, 154 Mass. 235, 236, W. Allen, J.

<sup>39</sup> Milford v. Holbrook, 9 Allen, 17, 21, per Hoar, J.; Lowell v. Spaulding, 4 Cush. 277; Lowell v. Short, 4 Cush. 275.

<sup>40</sup> Kirby v. Boylston Market Ass'n, 14 Gray, 249, per Merrick, J.

In another case,<sup>41</sup> a landlord had leased a store and the cellar under the same to a tenant, who was in possession at the time of the accident. There was an opening in front of the cellar window, and between the window and the sidewalk, into which the plaintiff fell. It was provided in the lease that the landlord might enter to make repairs. Ames, J., said: "It is to be observed that the cause of the injury was not to be found in any neglect of the tenant to keep the sidewalk in repair. The excavation, if a fault at all, was a fault in the original construction of the building, and was of course intentional on the part of the defendant. It had the general supervision of the whole, and had the entire control of the premises so far as was necessary to keep them and the approaches in proper and safe condition, and therefore this liability rested upon it."

The fact that there is a formal and unasserted right outstanding in an assignee of the lessee of premises will not prevent the lessor's being chargeable to the same extent as if there were no flaw in his right of possession, if he is actually in control.<sup>42</sup> Nor does the fact that he is a lunatic protect him; in such a case he is liable for the acts and neglects of his guardian.<sup>43</sup>

On the question whether a landlord is under any special liability to, or can be considered as extending any special invitation to, friends or invited guests of a tenant of part of the premises, see *supra*, § 188.

A lessee of an entire building who sublets to various tenants stands in the place of the landlord with respect to such tenants, and persons dealing with them.<sup>44</sup>

"It would seem to make no difference in the result whether the liability of the landlord, if it exists at all, is exclusive, or in common with an equal one on the part of the lessees. . . . because in an action of tort nonjoinder of the defendants is no defence."<sup>45</sup> Thus where a landlord who furnishes power to a

<sup>41</sup> *Larue v. Farren Hotel Co.*, 116 Mass. 67.

<sup>42</sup> *Learoyd v. Godfrey*, 138 Mass. 315.

<sup>43</sup> *Morain v. Devlin*, 132 Mass. 87.

<sup>44</sup> *Wright v. Perry*, 188 Mass. 268.

<sup>45</sup> *Milford v. Holbrook*, 9 Allen, 17, 22, per Hoar, J.; *Dalay v. Savage*, 145 Mass. 38, 41; *Clifford v. Atlantic Mills*, 146 Mass. 47, 49; *Poor v. Sears*, 154 Mass. 539; *Oxford v. Leathe*, 165 Mass. 254; *Munroe v. Carlisle*, 176 Mass. 199; *Gilland v. Maynes*, 216 Mass. 581, 583. *Cp.* *Field v. Gowdy*,



leased building, employs defective appliances, the failure of the lessee or his servants to warn a third person of danger is no defence to the landlord if the third person is injured by such appliances.<sup>46</sup> The fact that after an injury the landlord himself repaired the defect causing the injury is competent evidence as an admission that it was his duty to keep the defective part of the premises in repair;<sup>47</sup> and evidence may also be given as to whether the landlord usually made the repairs, or repairs of a certain kind.<sup>48</sup>

Where a landlord has sunk wells and built tenements which use the water from such wells, and has built drains from such tenements which empty into a brook, he is liable to a lower riparian owner for the pollution caused thereby even though he has reserved no right of control over the houses.<sup>49</sup> The reason is given by the court in the following words of Field, J. " . . . the houses, drains and wells were constructed and owned by the defendant, and were adapted to be used, and intended to be used by the tenants in the manner in which they were used. The defendant cannot escape responsibility because it has let the houses, and by the terms of the letting, retained no control over them. The right or authority to use the water from the wells in the houses, and to have it run off through the drains, was either given to the tenants by the letting, or was not; if not given the defendant has the control of the water; if given, the defendant has authorized this use of the water.<sup>50</sup> . . . If the injury to the plaintiff resulting from the defendant's unlawful pollution of the waters of the brook can be specifically ascertained, it is no defence that the plaintiff has in some degree also polluted the brook."<sup>51</sup>

An ordinance of the city placing the duty of caring for ice and snow upon tenants or occupants does not relieve the landlord. 199 Mass. 569, 571; *White v. Beverly Bldg. Assoc.*, 221 Mass. 15; *Howard v. Central Amusement Co.*, 224 Mass. 344.

<sup>46</sup> *Poor v. Sears*, 154 Mass. 539.

<sup>47</sup> *Readman v. Conway*, 126 Mass. 374; *O'Malley v. Twenty-five Associates*, 170 Mass. 471. *Cp. Coman v. Alles*, 198 Mass. 99.

<sup>48</sup> *O'Malley v. Twenty-five Associates*, 170 Mass. 471.

<sup>49</sup> *Jackman v. Arlington Mills*, 137 Mass. 277.

<sup>50</sup> *Ibid.*, p. 283.

<sup>51</sup> Field, J., in *Jackman v. Arlington Mills*, 137 Mass. 274, citing *Sherman v. Fall River Iron Works*, 5 Allen, 213; *Clarke v. French*, 122 Mass. 419; *Brown v. Dean*, 123 Mass. 254 (not however cases of landlord and tenant law).



lord from liability, even though a tenant had placed sand upon the ice and the tenant's children had brushed it off.<sup>52</sup>

A covenant that "the lessee will defend any law suit and pay any claim or damage arising from any accident or accidents to any person, persons or property in consequence of his occupancy of the herein leased premises" does not protect a landlord in control against direct liability for negligence.<sup>53</sup>

§ 337. **Evidence of control.**—Any evidence tending to show whether the landlord or the tenant is the one in control of the premises, or the part thereof constituting the nuisance or cause of damage, which is otherwise admissible, is competent on the question of liability.<sup>54</sup>

Thus, in an action for injury caused by the fall of a shed owned by the defendant, and used by A with his consent, A's testimony was that the defendant said he could not let the shed to him, but that he might use it free of charge if he would look after the premises; the defendant testified that he told A that he might use the premises and take care of them, paying no rent, and make what repairs were necessary. A third party testified that the defendant told A that he could use the shed, keeping it in shape for his occupancy such as he wanted. It was held to be a question for the jury whether A was a tenant of the defendant so as to be liable.<sup>55</sup>

In another case, a passer along the sidewalk was injured by the fall of an awning.<sup>56</sup> The court said: "The defendant owned the whole building, and all parts of it which were not leased to other persons remained in his own occupation. On the lower story were three shops and a doorway and stair-

<sup>52</sup> *Gilland v. Maynes*, 216 Mass. 581.

<sup>53</sup> *Follins v. Dill*, 221 Mass. 93, 98.

<sup>54</sup> See *supra*, § 190. In *Cerchione v. Hunnewell*, 215 Mass. 588, Rugg, C. J., said obiter: "Where such premises are let to a tenant at will who simply agrees to pay rent and assumes only the obligations flowing from the relation of tenancy at will, the landlord still may be held liable," citing *Jackman v. Arlington Mills*, 137 Mass. 277; *Maloney v. Hayes*, 206 Mass. 1; *Marston v. Phipps*, 209 Mass. 552. If this means, that in case of a tenancy at will either both landlord and tenant are liable, or that there is a greater presumption that the landlord is in control, it is submitted this is not the law; and that it is a question of fact in every case who is in control, subject to the principles as to defects existing and nuisances contemplated by the landlord at the creation of the tenancy. See *infra*, § 338.

<sup>55</sup> *Cunningham v. Cambridge Savings Bank*, 138 Mass. 480.

<sup>56</sup> *Milford v. Holbrook*, 9 Allen, 17.

case leading to the rooms above. The awning was an entire structure, extending over the sidewalk across the whole front of the building. There was evidence that it was built and maintained for the advantage of the shops; but there was no evidence that it was expressly leased with them or either of them. Certainly the part extending over the doorway leading to the upper story was used in connection with that and would furnish protection and convenience to persons resorting to the upper rooms. One of those rooms was leased to the town for a public library, and another to a fire company. The hall and room opposite were in the defendant's possession under the care of an agent, and let from time to time for temporary purposes. The town and fire company would of course have a right of passage by the stairs and entry in common with persons resorting to the hall and with the defendant himself. There was obviously, therefore, no such leasing of the upper story to tenants as would exonerate the landlord from all responsibility for the whole building; nor, as we think, as would create any responsibility in the fire company or the town for the condition of the passages leading to the rooms which they hired. That responsibility remained with the general owner and partial occupant. And in view of all these facts, we think his liability for the awning is like that which he would be under for the condition of the roof, the eaves, the chimneys, or other parts of the building not appropriated to the exclusive use of any particular tenant or to all of them to the exclusion of the landlord." <sup>57</sup>

In still another case, the defendant was administrator of one of two mortgagees of real estate, on which was a mill and a reservoir dam. While the premises were in possession of certain persons under license from the other mortgagee, who had subsequently quitclaimed all his interest therein to the defendant, the dam broke away, as the plaintiffs alleged, because of its original insufficiency and subsequent want of repair, and carried away the plaintiff's bridges. It was held that the defendant was not in possession either by himself or by his tenants and therefore was not liable. <sup>58</sup>

Where a hotel company had taken partial possession under a lease, and a contractor was putting on the finishing touches, and an employe of a contractor was injured by the negligent operation of an elevator which was also carrying employees of

<sup>57</sup> *Milford v. Holbrook*, 9 Allen, 17, 22, per Hoar, J.

<sup>58</sup> *Oakham v. Holbrook*, 11 Cush. 299.

the lessee, it was held that the plaintiff was not a mere licensee and that the question whether the elevator boy was in the employ of the lessee was for the jury.<sup>59</sup>

Where a dwelling house of one story and a half was divided through the centre, there being a front door to each tenement twenty inches above the ground, and a step six inches above the ground consisting of a single plank raised on blocks at each end and extending in front of both doors, the tenant of each half is in control of the half of the step in front of his door.<sup>60</sup>

In *Readman v. Conway*,<sup>61</sup> the defendant was the owner of a building consisting of three shops or tenements standing back forty feet from the street and with a wooden platform extending from it to the sidewalk. The platform had no fences or lines of any kind separating the parts thereof in front of the several shops from each other, but was entirely open. In an action for injuries from a defect in the platform it was held that the jury might find that the platforms were not leased to the several tenants, but that they were constructed, kept open and controlled by the landlord, for the common use of occupants of all the shops and of the public, and that if such was the fact the responsibility rested with the landlord.

In an action for damages from the negligent operation of an elevator, evidence that the landlord had an elevator accident policy is admissible on the question of control.<sup>62</sup>

Where separate parts of a building are let, but the use and control of the roof remains with the landlord, he and not the tenants is liable for defects in construction and maintenance whereby snow and ice are allowed to fall upon the passers-by in the street below.<sup>63</sup> And, conversely, though the landlord reserve a right to enter to repair the premises and to ascertain if they are properly used, if the general control of the roof does not remain with him he will not be liable for snow and ice falling therefrom,<sup>64</sup> but the tenant will be liable.<sup>65</sup> If there are two

<sup>59</sup> *Gardner v. Copley-Plaza Operating Co.*, 220 Mass. 372.

<sup>60</sup> *Kearnes v. Cullen*, 183 Mass. 298.

<sup>61</sup> 126 Mass. 374.

<sup>62</sup> *Perkins v. Rice*, 187 Mass. 28.

<sup>63</sup> *Shipley v. Fifty Associates*, 101 Mass. 251; s. c., 106 Mass. 194; *Marston v. Phipps*, 209 Mass. 552; *Connors v. Richards*, 230 Mass. 436.

<sup>64</sup> *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47; *Coman v. Alles*, 198 Mass. 99.

<sup>65</sup> *Wixon v. Bruce*, 187 Mass. 232; *Coman v. Alles*, 198 Mass. 99.

tenants, one of the ground floor and one of the upper part of a house, each of whom has covenanted to save the lessor harmless from ice and snow, the lower tenant has control of the sidewalks adjoining the house, and is liable to third persons.<sup>66</sup> Where the landlord has control of common steps, and has assumed the duty of cleaning off ice and snow, he is liable for a slippery condition.<sup>67</sup>

In *Leonard v. Storer*,<sup>68</sup> the liability assumed by the tenant was defined by the court as follows: "The whole of this building had been leased for a long term of years to a tenant who was in actual occupation at the time of the accident. By the terms of the lease the tenant bound himself to make certain specific alterations in the lower story of the building, and also to make, at his own expense, 'all needful and proper repairs, both external and internal, of the demised premises.' The lessee was the occupant of the entire estate, and as between himself and the public was bound to keep the building in such a state of repair that the adjoining highway should be safe for the use of travellers thereon."<sup>69</sup> In *Clifford v. Atlantic Cotton Mills*,<sup>70</sup> Holmes, J., said: "It may be that the tenant had a right to put a guard upon the roof in *Leonard v. Storer*, but if so, his right was independent of his covenant to repair, and the tenant had the same right in the present case."<sup>71</sup> In either case a guard might have been put up before the lease was made. The decision in *Leonard v. Storer* was on the ground that 'it does not appear that [the tenant] might not have cleared the roof of snow by the exercise of due care, or that he could not by proper precautions have prevented the accident.'"

In accordance with the general principle, a landlord who continues to furnish power by means of pulleys and shafting to an adjoining building after such building is leased, and who controls such appliances, is bound to use reasonable care to see that such appliances are in suitable condition to perform their work. In such a case evidence of the unsuitableness or defective condition of the appliances may be given,

<sup>66</sup> *Wixon v. Bruce*, 187 Mass. 232.

<sup>67</sup> *Erickson v. Buckley*, 230 Mass. 467.

<sup>68</sup> 115 Mass. 86.

<sup>69</sup> *Ibid.*, p. 88, per Ames, J.

<sup>70</sup> 146 Mass. 47, 48.

<sup>71</sup> *Boston v. Worthington*, 10 Gray, 496, 500. See *Swords v. Edgar*, 59 N. Y. 28, 36.

and of the results of an examination of the appliances after an accident, on the issue whether they were suitable and whether due care had been used in their maintenance and operation.<sup>72</sup> So also evidence may be given as to any repairs made by the landlord after an accident and of the attention given to the appliances by his servants after the lease of the building on the issue of whether the landlord exercised control over the same.<sup>73</sup>

Voluntary repairs by a landlord do not tend to show control;<sup>74</sup> but where a landlord makes all repairs this does show control;<sup>75</sup> and the same is true where the landlord assumes the care of keeping the sidewalk free from ice and snow.<sup>76</sup>

On the other hand, where an entire building is leased and the tenant covenants to make all necessary repairs, and maintains a wooden canopy over a door with no water conductor upon it, he is the one liable for injuries from ice on the sidewalk.<sup>77</sup>

§ 338. Where defects existed or nuisances contemplated by landlord, at time of lease.—The mere fact that a defect in the premises was there before the tenant commenced his occupation, is no defence to the tenant in an action for injury by a third person, and neither is a covenant between lessor and lessee against alterations; nor, it seems, would a positive covenant to continue the existing state of the premises be any defence.<sup>78</sup> Thus, where the plaintiff was thrown down an embankment in consequence of the unsafe condition of a walk leading up to a dwelling-house, the court said: "the fact that the walk was in the same condition before the demise, is not material. The defendant did not guarantee that the premises should be safe for all the uses to which the tenant might put them. The tenant alone had the right to determine

<sup>72</sup> *Poor v. Sears*, 154 Mass. 539; *O'Malley v. Twenty-five Associates*, 170 Mass. 471. *Cp.* dissenting opinion in the latter case; *O'Malley v. Twenty-five Associates*, 178 Mass. 555.

<sup>73</sup> *Poor v. Sears*, 154 Mass. 539; *O'Malley v. Twenty-five Associates*, 170 Mass. 471. *Cp.* *Coman v. Alles*, 198 Mass. 99.

<sup>74</sup> *Maloney v. Hayes*, 206 Mass. 1.

<sup>75</sup> *Marston v. Phipps*, 209 Mass. 552.

<sup>76</sup> *Ibid.*; *Erickson v. Buckley*, 230 Mass. 467.

<sup>77</sup> *Stefani v. Freshman*, 232 Mass. 354.

<sup>78</sup> *Boston v. Worthington*, 10 Gray, 495, per Metcalf, J; *Mellen v. Morrill*, 126 Mass. 545.

It seems, however, that the repairing of a defect would not be any breach of a covenant against alterations and additions. *Cp. supra*, § 81.

the purposes for which he would use the premises. If he used them so as impliedly to make people visit them in the night, it was his duty to make them safe by a railing or by a light or other warning. It was not the duty of the landlord, and indeed he would not have the right, without the consent of the tenant to do this."<sup>79</sup> So also, where a privy obstructed a right of way so as to be a nuisance, the court said that if a tenant for years of the premises had restored the nuisance after the plaintiff abated it, he would be liable; but where the nuisance had been on the premises before the lease, and the lessee did nothing more than maintaining it in the condition in which he found it, he "cannot reasonably be regarded as a wrong doer, till the party injured distinctly and unequivocally complains to him of the injury and informs him that he is expected to act in the matter and remove it."<sup>80</sup> Where, however, a lessee merely suffers the defect or nuisance to remain, he must be first asked to abate it.<sup>81</sup>

There is an exception to the rule that the landlord is *prima facie* not liable for defects, where "the use from which the damage or nuisance necessarily ensues was plainly contemplated by the lease." In such cases the "landlord can be held, although the tenant may also be liable to the person injured, for the landlord is taken to have contemplated the premises remaining in the condition in which he let them."<sup>82</sup>

Thus, where premises are leased with a nuisance upon them, it was said that "the landlord or grantor himself is liable, notwithstanding, his lease or grant, for the continuance

<sup>79</sup> *Mellen v. Morill*, 126 Mass. 545, *Morton, J.*; *Baker v. Tibbetts*, 162 Mass. 468; *Dickie v. Davis*, 217 Mass. 25.

<sup>80</sup> *McDonough v. Gilman*, 3 Allen, 264, 267, per *Chapman, J.*

<sup>81</sup> *Lufkin v. Zane*, 157 Mass. 117; *McDonough v. Gilman*, 3 Allen, 264. *Cp.* as to grants, *Prentiss v. Wood*, 132 Mass. 486.

<sup>82</sup> *Clifford v. Atlantic Mills*, 146 Mass. 47, 49, per *Holmes, J.*; *Dalay v. Savage*, 145 Mass. 38, 41; *Swords v. Edgar*, 59 N. Y. 28, 34; *Larue v. Farren Hotel Co.*, 116 Mass. 67, per *Merrick, J.*; *Saltonstall v. Banker*, 8 Gray, 195; *Lufkin v. Zane*, 157 Mass. 117; *Case v. Minot*, 158 Mass. 577; *Jackman v. Arlington Mills*, 137 Mass. 277; *Learoyd v. Godfrey*, 138 Mass. 315; *Oxford v. Leathe*, 165 Mass. 254; *Taylor v. Loring*, 201 Mass. 283, 285; *Maloney v. Hayes*, 206 Mass. 1 (defective water conductor); *Marston v. Phipps*, 209 Mass. 552 (ice and snow); *Cerchione v. Hunnewell*, 215 Mass. 588 (ice and snow); *Howard v. Central Amusement Co.*, 224 Mass. 344 (defective ornament). *Cp.* *Staple v. Spring*, 10 Mass. 72, 74; *Neas v. Lowell*, 193 Mass. 441; *Clapp v. Donaldson*, 195 Mass. 39.

of the nuisance.”<sup>83</sup> And in *Roswell v. Pryor*,<sup>84</sup> the reason is thus well stated by the court: “Surely this action is well brought against the erector [landlord], for before his assignment over he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting it over, and more especially here, where he grants over, reserving rent, whereby he agrees with the grantee that the nuisance should continue, and has a recompense, viz., the rent for the same; for surely, when one erects a nuisance, and grants it over in that manner, he is a continuer with a witness.”

In a case of damage from the drainage of a stable,<sup>85</sup> Field, C. J., said: “If the condition of the premises of itself is such as to constitute a nuisance, it has been held that by the letting the landlord authorizes the continuance of the nuisance. If the premises are a nuisance, not in themselves but in consequence of the use made of them by the tenant, then the question is whether this use is authorized by the landlord. If the premises can be used by the tenant in the manner intended by the landlord, either as shown by the construction of the premises or by the terms of the lease, or by other evidence, without becoming a nuisance, the landlord is not liable for the acts or neglect of the tenant which creates the nuisance. If the tenant creates the nuisance without authority of the landlord, and after he has entered into occupation as tenant, the landlord is not liable.” So, where the owner of a building had permitted its use for an exhibition by either a license or a lease to one Gleason, and a third person was injured by the falling of a platform, Holmes, J., said:<sup>86</sup> “the defendant must be taken, or at least might have been found, to have contemplated the use of the stairs and platform, as they were, by the public for the purpose of going to the show. If the jury found that the use actually made of the platform was something which the defendant was bound to have contemplated, he was liable for any neglect of proper precau-

<sup>83</sup> Per Chapman, J., in *McDonough v. Gilman*, 3 Allen, 264, 267 (case of a privy obstructing a right of way); *Frischburg v. Hurter*, 173 Mass. 22 (defective coal-hole); *Hill v. Hayes*, 199 Mass. 411; *Wells v. Ballou*, 201 Mass. 244 (coal-hole); *Maloney v. Hayes*, 206 Mass. 1 (water conductor); *Howard v. Central Amusement Co.*, 224 Mass. 344 (defective ornament)

<sup>84</sup> 12 Mod. 635.

<sup>85</sup> *Lufkin v. Zane*, 157 Mass. 117, 122.

<sup>86</sup> *Oxford v. Leathe*, 165 Mass. 254, 255.



tions, to make it safe, whether Gleason also was to blame or not, just as in the case of premises let with a nuisance upon them. . . . We do not intend at all to enlarge the liability of landlords in cases where heretofore it has been decided that only the occupants of the land were responsible. We mean by contemplated more than foreseen. A landlord may regard many things as likely to happen for which he will not have to answer, but this case goes much beyond that point. The object of the contract with Gleason was that the public should be invited, since it was from the public that the defendant was to get his pay. At the same time, the short and uninterrupted character of the occupation allowed to Gleason made it obvious that the safety of the building must be left mainly to the defendant."

"But the courts have differed when the nuisance existing at the time of the lease was due to want of repairs, and the tenant had covenanted to make repairs."<sup>87</sup> Apparently an agreement by the tenant to put the premises in proper repair relieves the landlord of liability for injury resulting from lack of such repair.<sup>88</sup>

And where the tenant has the right to make alterations and even to replace existing structures, and has agreed to save the lessor harmless from damages arising from any nuisance, it cannot be said that the landlord contemplates the existence of the nuisance.<sup>89</sup> Where a tenant of the defendant through negligence of repairing a drain flooded the plaintiff's cellar, the court said: "The defendant would not be liable for any negligence of which his tenant might be guilty in making repairs, merely because he sustained toward him the relation of landlord."<sup>90</sup>

On the same general principle, that the tenant is *prima facie* liable to third persons for defects, "if the nuisance is created by a tenant or by a former owner who has let the premises to a tenant, a grantee subject to the tenancy in consequence of the purchase and the subsequent receipt of rent, is not made liable to third persons for the use which the tenant continues to make of the premises, even if it constitutes

<sup>87</sup> Clifford v. Atlantic Mills, 146 Mass. 47, 49, per Holmes, J.

<sup>88</sup> Dalay v. Savage, 145 Mass. 38, 40. Cp. Coman v. Alles, 198 Mass. 99.

<sup>89</sup> Cerchione v. Hunnewell, 215 Mass. 588 (ice and snow).

<sup>90</sup> Murray v. Richards, 1 Allen, 414, Chapman, J.



a nuisance.”<sup>91</sup> This is because the grantee cannot interfere with the tenant unless he has made or suffered strip or waste, and he is not bound to interfere for the benefit of a third person.

But “the landlord will not be liable for the use of the premises in such a way as to do harm, merely because there was a manifest possibility of their being used in such a way. The liability will stop with the tenant whose intervening wrong is the immediate cause of the damage.”<sup>92</sup> “If a landlord lets premises not in themselves a nuisance, but which may or may not become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are or not, he cannot be made responsible for the acts of his tenant.”<sup>93</sup> Thus, a landlord had provided a lock for the doors of an elevator well in his building, and after the door was locked and the key deposited in the landlord’s office, a tenant who had the right to use the elevator in common with others, obtained the key without the landlord’s knowledge and left the door unlocked, whereby a third person opening the door in the dark fell and was injured. It was held that no negligence was attributable to the landlord.<sup>94</sup> Nor is he liable for an accident occasioned by the darkness of a leased building at a particular time or the particular plan of construction of a hallway, there being no concealed trap or source of mischief.<sup>95</sup> Nor is a landlord obliged to see that excavations in sidewalks made by him and covered when let are afterwards kept covered;<sup>96</sup> or a hole in a floor for passing material to the floor below.<sup>97</sup> Nor that lights in a sidewalk made of iron and glass do not wear smooth.<sup>98</sup>

<sup>91</sup> *Lufkin v. Zane*, 157 Mass. 117, 122, per Field, C. J.; *Dalay v. Savage*, 145 Mass. 38.

<sup>92</sup> *Holmes, J.*, in *Clifford v. Atlantic Mills*, 146 Mass. 47, 49; *Mellen v. Morrill*, 126 Mass. 545; *Lufkin v. Zane*, 157 Mass. 117; *Caldwell v. Slade*, 156 Mass. 84; *Neas v. Lowell*, 193 Mass. 441; *Baker v. Tibbetts*, 162 Mass. 468; *Cerchione v. Hunnewell*, 215 Mass. 588; *Dickie v. Davis*, 217 Mass. 25, 30.

<sup>93</sup> Per *Cresswell, J.*, in *Rich v. Butterfield*, 4 C. B. 783; *Coman v. Alles*, 198 Mass. 99.

<sup>94</sup> *Handyside v. Powers*, 145 Mass. 123.

<sup>95</sup> *Hutchinson v. Cummings*, 156 Mass. 329.

<sup>96</sup> *Lowell v. Spaulding*, 4 Cush. 277; *Stewart v. Putnam*, 127 Mass. 403.

<sup>97</sup> *Caldwell v. Slade*, 156 Mass. 84.

<sup>98</sup> *Boston v. Gray*, 144 Mass. 53.

Even where a nuisance exists upon the premises when let; yet, if they can be used by the tenant in the manner intended by the owner without a nuisance arising, the owner is not liable for injuries caused by a nuisance created by acts of omission or commission done by the tenant without his authority.<sup>99</sup>

To make the landlord liable in any case, it must appear that the defect existed at the time of the letting. Thus when, in a coal-hole case, the accident happened, eight months after the letting, through the edges becoming worn, and it was not shown that the coal-hole was defective at the time of the letting, the landlord was held not liable.<sup>100</sup> But where there is no evidence of its condition at the time of the letting, the plaintiff may show its defective condition before the letting and that its condition was substantially the same up to the time of the accident.<sup>101</sup> The fact that the landlord was asked by the tenant to repair, and refused to do so, has been held to show an assumption by the tenant of liability for the defect.<sup>102</sup>

The mere fact that a building is let without any provision for artificial light does not constitute a nuisance.<sup>103</sup>

§ 339. Where landlord bound to repair.—Even where the landlord is expressly bound to repair, he is obliged to make repairs only upon reasonable notice from the tenant, and the mere want of repair in the absence of such notice will not show such active negligence or misfeasance on his part as will render him liable for an accident, due to such want of repair.<sup>104</sup> This has been expressed by Morton, C. J., as follows:<sup>105</sup> “As a general rule, there must be some active negligence or misfeasance to support tort. There must be some breach of duty distinct from breach of contract. In the case at bar, the utmost shown against the defendant is that there was an un-

<sup>99</sup> *Coman v. Alles*, 198 Mass. 99 (ice from roof); *Cerchione v. Hunnewell*, 215 Mass. 588.

<sup>100</sup> *Clapp v. Donaldson*, 195 Mass. 39.

<sup>101</sup> *Hill v. Hayes*, 199 Mass. 411.

<sup>102</sup> *Clapp v. Donaldson*, 195 Mass. 39.

<sup>103</sup> *Stone v. Lewis*, 215 Mass. 594, 597.

<sup>104</sup> *Hutchinson v. Cummings*, 156 Mass. 329 (defect in door of elevator well); *McLean v. Fiske Wharf, etc., Co.*, 158 Mass. 472 (defective privy); *Marley v. Wheelwright*, 172 Mass. 530 (defective stairway); *Morain v. Devlin*, 132 Mass. 87 (defective step). *Cp.* *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 175; *Brewer v. Farnham*, 208 Mass. 448.

<sup>105</sup> *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 175.

reasonable delay on its part in performing an executory contract." It seems that the landlord might bind himself to repair without notice of defects; but, in the absence of such agreement and of such notice, a verdict is rightly directed for the landlord.<sup>106</sup>

Where a tenant informed his landlord of a leak in a drain, and the landlord gave him no definite directions, but told him to do what was necessary and that he would pay a certain sum therefor, whereupon the tenant negligently repaired the drain and flooded the cellar of a third person, it was held that the relation of master and servant, or principal and agent, was not established, inasmuch as it was left to the tenant to use his own judgment as to the time and manner of making repairs, and gave the defendant no right to direct or control him.<sup>107</sup>

Where the tenant is not bound to repair; and the landlord leases the premises with a nuisance, and, on being notified of the nuisance, attempts to repair and does not do so properly, he is liable to a third person injured.<sup>108</sup>

The fact that under the lease a landlord *may* make repairs, if he so elects, does not relieve the lessee from liability to third persons.<sup>109</sup>

§ 340. **Servants, agents and contractors.**—Where either the landlord or the tenant, being the "occupier," employs a servant to do certain work about the premises, he is liable on general principles for the servant's negligence.<sup>110</sup> This is why the owner of property, though a lunatic, is liable for the acts of his guardian who has the care and management of the property.<sup>111</sup>

But, in one case,<sup>112</sup> the jury were instructed that if a teamster of a coal merchant had exclusive possession or control of leased premises so far as was necessary to enable him to put coal into the cellar, the lessees would not be liable for his negligence, and the mere fact of their occupancy and

<sup>106</sup> *McLean v. Fiske Wharf Co.*, 158 Mass. 472. See *Munroe v. Carlisle*, 176 Mass. 199.

<sup>107</sup> *Murray v. Richards*, 1 Allen, 414.

<sup>108</sup> *Hill v. Hayes*, 199 Mass. 411.

<sup>109</sup> *Boston v. Gray*, 144 Mass. 53.

<sup>110</sup> *Stewart v. Putnam*, 127 Mass. 403; *Poor v. Sears*, 159 Mass. 539. *Cp. Clapp v. Kemp*, 122 Mass. 481.

<sup>111</sup> *Morain v. Devlin*, 132 Mass. 87.

<sup>112</sup> *Clapp v. Kemp*, 122 Mass. 481.

of contracting for coal would not make the teamster their servant.

The same principle applies where the landlord employs an independent contractor to do work which renders the premises dangerous; and if the landlord, having general charge of that portion of the premises upon which work is done, employs a tenant to do the work, it would seem that he does not thereby relieve himself from liability to third persons.<sup>113</sup> So, the lessor may entrust the control of property to the lessee in such a way as to be affected by the negligence of the latter.<sup>114</sup>

§ 341. **Cities and towns as third parties.**<sup>115</sup>—Cities and towns are primarily responsible to those using the streets and ways for defects and dangers therein;<sup>116</sup> but, where a city or town has been compelled to pay damages to a party injured through the default of an owner or occupier, it has a remedy over against such owner or occupier to recover what it has paid.<sup>117</sup> This remedy is independent of subrogation, and therefore the fact that the defendant is the landlord of the person injured is no defence.<sup>118</sup>

A failure of the city or town to remedy a nuisance caused by the owner or occupier is no bar to such claim for indemnity;<sup>119</sup> and it is obvious that an owner or lessee cannot maintain an action against the city or town for injury caused by a defect in a portion of the sidewalk, which it was his duty to keep in repair.<sup>120</sup>

<sup>113</sup> *Curtis v. Kiley*, 153 Mass. 123; *Lorenzo v. Wirth*, 170 Mass. 596. *Cp. Robbins v. Atkins*, 168 Mass. 45.

<sup>114</sup> *Bartlett v. Boston Gas Light Co.*, 117 Mass. 533. See *Burt v. Boston*, 122 Mass. 223.

<sup>115</sup> See *infra*, § 342. As to liability of the commonwealth for injuries on state highways, see G. L., c. 81, § 18.

<sup>116</sup> G. L., c. 229, § 1; R. L., c. 51; c. 47, § 14; Pub. St., c. 52 and amendments, especially Sts. 1896, c. 345, § 2 and c. 540; St. 1894, c. 422; St. 1902, c. 406, and review of cases in *McGowan v. Boston*, 170 Mass. 384. By St. 1902, c. 406, actions of tort for injury to the person against cities and towns must be brought within two years after the cause of action accrues. *Mulvey v. Boston*, 197 Mass. 178.

<sup>117</sup> *Milford v. Holbrook*, 9 Allen, 17; *Lowell v. Spaulding*, 4 Cush. 277; *Boston v. Worthington*, 10 Gray, 496; *Lowell v. Boston & Lowell R. R.*, 23 Pick. 24; *Boston v. Gray*, 144 Mass. 53; *Burt v. Boston*, 122 Mass. 223.

<sup>118</sup> *Holyoke v. Hadley Co.*, 174 Mass. 424.

<sup>119</sup> *Milford v. Holbrook*, 9 Allen, 17; *Lowell v. Boston & Lowell Railroad*, 23 Pick. 24; *Lowell v. Short*, 4 Cush. 275.

<sup>120</sup> *Burt v. Boston*, 122 Mass. 223.

§ 342. Provisions as to ice and snow.<sup>121</sup>—“Cities by ordinance and towns by by-laws may provide for the removal of snow and ice from sidewalks within such portions of the city or town as they consider expedient by the owner or occupant of land abutting upon such sidewalks. Such ordinances and by-laws shall determine the time and manner of removal and shall affix penalties, not exceeding fifty dollars in the case of a city or ten dollars in the case of a town, for each violation thereof.”<sup>122</sup>

This provision applies to both landlords and tenants. The following four provisions apply only to owners or their agents.

Cities and towns may, by ordinance order or by-law, provide for “the removal of snow and ice from the sidewalks within the limits of the public ways therein to such extent as they deem expedient. The penalty for the violation of such by-laws shall apply to the owner of abutting property or his agent having charge thereof.”<sup>123</sup>

Cities and towns may make orders and by-laws, and affix penalties not exceeding twenty dollars, “For preventing the fall of snow and ice from the roofs and securing the removal thereof in such portions of their limits and to such extent as they may deem expedient. The penalty for violation of such by-laws shall apply to the owner of such building or to his agent having the care thereof.”<sup>124</sup> Also “for requiring owners of buildings near the line of public ways to erect barriers, or to take other suitable measures to prevent the fall of snow and ice therefrom upon persons traveling on such streets and ways,

<sup>121</sup> For other cases of accident from ice and snow, see *supra*, §§ 334–340. For covenants regulating liability, see *supra*, § 101.

<sup>122</sup> G. L., c. 85, § 5; R. L., c. 52, § 5; Pub. St., c. 53, §§ 7–9; St. 1878, c. 89, § 1; St. 1863, c. 114, §§ 1, 2; Gen. St., c. 45, § 9; St. 1857, c. 64, §§ 1, 2. Cited in *Easthampton v. Hill*, 162 Mass. 302; *Clinton v. Welch*, 166 Mass. 133; *Stanton v. Springfield*, 12 Allen, 566. The last case decides that, if there is no defect in the construction of a way, the fact that it is slippery with level ice will not entitle one to damages who is injured by falling thereon.

In *Commonwealth v. Watson*, 97 Mass. 562, the ordinances of the city of Boston, in force at the time, put the obligation of removing snow from the sidewalk in front of his premises upon the “tenant, occupant, and in case there shall be no tenant, the owner, or any person having the care of any building or lot of land bordering on any street.”

<sup>123</sup> G. L., c. 40, § 21, cl. 3; R. L., c. 25, § 23; St. 1898, c. 190, § 1; R. L., c. 26, § 2.

<sup>124</sup> G. L., c. 40, § 21, cl. 2; R. L., c. 25, § 23; St. 1863, c. 86; R. L., c. 26, § 2.

and to protect such persons from other dangers incident to the maintenance, occupation or use thereof." <sup>125</sup>

Where, under a by-law, the duty is put upon "the tenant, occupant, and, in case there shall be no tenant, the owner, or person or corporation having the care of any land or building fronting, etc.," the owner of a building, one tenement of which is vacant, is liable for snow and ice on that part of the sidewalk in front of the vacant tenement.<sup>126</sup> The by-law may impose the maximum penalty mentioned in the statute.<sup>127</sup>

But "owners and occupants of the land and building . . . are not responsible to individuals for injuries resulting to them from defects and want of repair in the sidewalk, or by means of snow and ice accumulated by natural causes thereon, although, by ordinances of the city, it is made the duty of abutters, under prescribed penalties, to keep the sidewalks adjoining their estates in good repair and seasonably to remove all snow and ice therefrom. Such ordinances are valid, and the work which is enforced under them relieves, to the extent of its cost or value, the city [or town] which otherwise it would be necessarily in the discharge of its municipal duties subjected to." <sup>128</sup> And in the absence of any ordinance requiring the removal of ice and snow, if the occupant has done nothing to

<sup>125</sup> G. L., c. 40, § 21, cl. 4; R. L., c. 25, § 23; Pub. St., c. 27, § 15; St. 1879, c. 91; R. L., c. 26, § 2.

<sup>126</sup> *Easthampton v. Hill*, 162 Mass. 302. See *Gilland v. Maynes*, 216 Mass. 581.

<sup>127</sup> *Clinton v. Welch*, 166 Mass. 133.

<sup>128</sup> *Merrick, J.*, in *Kirby v. Boylston Market Association*, 14 Gray, 249, 252, citing *Goddard, Petitioner*, 16 Pick. 504. This latter case decides that an ordinance applying to only part of the city may be valid.

As to the liability of a city or town in such a case see G. L., c. 84, §§ 15-22; c. 81, §§ 18, 19, 31; R. L., c. 51, especially §§ 19, 20, c. 47, § 14; Pub. St., c. 52; St., 1896, c. 345, § 2; St. 1896, c. 540; St. 1894, c. 422. G. L., c. 84, § 17, provides that "a county, city or town shall not be liable for an injury or damage sustained upon a public way by reason of snow or ice thereon, if the place at which the injury or damage was sustained was at the time of the accident otherwise reasonably safe and convenient for travelers." See *McGowan v. Boston*, 170 Mass. 384; *Shipley v. Proctor*, 177 Mass. 368; *Newton v. Worcester*, 174 Mass. 181; *Hadden v. Somerville*, 197 Mass. 480; *Bailey v. Cambridge*, 174 Mass. 188; *Hitchcock v. Boston*, 201 Mass. 299; *Baird v. Baptist Society*, 208 Mass. 29; *Cannon v. Worcester*, 225 Mass. 270; *Townsend v. Boston*, 232 Mass. 451.

cause snow to accumulate upon the sidewalk, he is under no liability whatever in regard thereto.<sup>129</sup> But we have seen that one who creates a nuisance upon the sidewalk in front of his estate is liable to one injured thereby, and this principle applies to snow and ice put by the tenant upon the sidewalk.<sup>130</sup>

Where a roof is so constructed and maintained that quantities of ice and snow accumulate and fall upon passers-by in the street, third persons injured thereby may have an action.<sup>131</sup> In such a case the fact that the roof of the building is of a usual character is no defence, and the maxim *sic utere tuo ut non alienum lædas* applies.<sup>132</sup>

The court has said: "Their defence proceeds upon the ground that the damage to the plaintiff was the result of an inevitable accident; that travellers in the streets in cities, in this climate, take the risk of such accidents upon themselves, as they do the danger of injury from runaway horses, or from the slippery or crowded condition of the streets; and that the defendants cannot be said to be to blame or to be responsible, unless it can be shown that their building was of an unusual or improper construction, or that they neglected to take proper precautions in its care or management. . . . It is not at all a question of reasonable care and diligence in the management of his roof, and it would be of no avail to the party to show that the building was of the usual construction, and that the inconvenience complained of was one which, with such a roof as his, nothing could prevent or guard against. . . . He must at his peril keep the ice or snow that collects upon his own roof within his own limits; and is responsible for all damages if the shape of his roof is such as to throw them upon his neighbor's land, in the same manner as he would be if he threw them there himself." <sup>133</sup>

<sup>129</sup> *Commonwealth v. Watson*, 97 Mass. 562; *Kirby v. Boylston Market Association*, 14 Gray, 249.

<sup>130</sup> *Kirby v. Boylston Market Association*, 14 Gray, 249.

<sup>131</sup> *Shipley v. Fifty Associates*, 101 Mass. 251; s. c., 106 Mass. 194; *Leonard v. Storer*, 115 Mass. 86; *Clifford v. Atlantic Mills*, 146 Mass. 47; *Wixon v. Bruce*, 187 Mass. 232; *Neas v. Lowell*, 193 Mass. 441; *Coman v. Alles*, 198 Mass. 99; *Maloney v. Hayes*, 206 Mass. 1; *Brewer v. Farnam*, 208 Mass. 448; *Stefani v. Freshman*, 232 Mass. 354.

<sup>132</sup> *Shipley v. Fifty Associates*, 106 Mass. 194. *Cp. Coman v. Alles*, 198 Mass. 99.

<sup>133</sup> *Ibid.*, p. 197, per Ames, J.



The same principles apply to ice forming on the sidewalk from water coming from roofs, gutters and water conductors.<sup>134</sup>

In the case of actions for injuries from ice or snow, the following statute provisions apply:

The provision of General Laws, c. 84, 18-20, "so far as they relate to notices of injuries resulting from snow and ice, shall apply to actions against persons founded upon the defective condition of their premises, or of adjoining ways, when caused by, or consisting in part of, snow or ice. Such notice may be given by leaving it with the occupant of said premises, or if there is no occupant, by pasting it in a conspicuous place thereon, and no such notice shall be invalid by reason of any inaccuracy or misstatement in respect to the owner's name if it appears that such error was made in good faith and did not prevent or unreasonably delay the owner from receiving actual notice of the injury and of the contention that it occurred from the defective condition of his premises or of a way adjoining the same." <sup>135</sup>

Under these provisions, it has been held that a notice sent by mail is sufficient; <sup>136</sup> and that it is good although signed by the husband of an injured woman in his own name, and does not state that it was signed on her behalf.<sup>137</sup> A notice is good, also, although addressed to "the person, persons or corporation in control of the premises," although no one is named; <sup>138</sup> and so is one addressed to a cestui instead of to a trustee, if the latter receives it within thirty days and is not misled.<sup>139</sup>

But a notice in writing is a condition precedent to bringing the action.<sup>140</sup> And where a notice was given by an attorney

<sup>134</sup> *Field v. Gowdy*, 199 Mass. 568; *Merrill v. Paige*, 229 Mass. 511; *Stefani v. Freshman*, 232 Mass. 354.

<sup>135</sup> G. L., c. 84, § 21. Cited in *Baird v. Baptist Society*, 208 Mass. 29; *O'Donoghue v. Moors*, 208 Mass. 473; *Paszkowski v. Stony Brook Paper Co.*, 210 Mass. 86; *Mallen v. Houston Co.*, 211 Mass. 298; *Sullivan v. Wilson*, 213 Mass. 342; *McNamara v. Boston & Maine R. R.*, 216 Mass. 506; *Tobin v. Taintor*, 229 Mass. 174; *Merrill v. Paige*, 229 Mass. 511; *O'Neil v. Squire*, 230 Mass. 294; *Erickson v. Buckley*, 230 Mass. 467; *Stefani v. Freshman*, 232 Mass. 354; *Haverty v. Ernst*, 232 Mass. 543. As to the correction of defective notices, see G. L., c. 84, § 20.

<sup>136</sup> *Tobin v. Taintor*, 229 Mass. 174.

<sup>137</sup> *Merrill v. Paige*, 229 Mass. 511.

<sup>138</sup> *Stefani v. Freshman*, 232 Mass. 354.

<sup>139</sup> *Haverty v. Ernst*, 232 Mass. 543.

<sup>140</sup> *O'Neil v. Squire*, 230 Mass. 294, 296; *Baird v. Baptist Society*, 208



for one who later became administrator of the injured person, this was held not to be a good notice, as the administrator had no rights until his appointment.<sup>141</sup>

If a husband wishes to maintain an action for consequential damages arising from an injury to his wife, he is required to give the statutory notice, even though she has given a notice in which she claims damages in her own behalf.<sup>142</sup>

Where a notice is not given within the time limited, the burden of proving an adequate excuse is on the injured person.<sup>143</sup> And where a notice was not given until nine days after the expiration of the period limited, the facts that the person injured was five weeks in a hospital part of the time under opiates, but that immediately, after the accident she had told her sister with whom she lived all about it, and that "plenty of people" came to see her at the hospital, it was held a verdict for the defendant was proper.<sup>144</sup>

Where a city has paid a judgment for an accident caused by ice in a highway due to the negligence of a third person, it has an action against such third person, even though such third person is landlord of the person injured, and no action could have been brought against such third person by reason of the relation. The city has a right independent of subrogation.<sup>145</sup>

§ 342a. **Pleading.**—The injured person may bring separate actions against the landlord and the tenant, or he may join them in one action.<sup>146</sup> It seems that, in the latter case, both cannot be held in the absence of joint negligence; but a verdict in favor of one of them operates as a discontinuance and discharge as to him, so that the case can proceed to judgment against the other.<sup>147</sup>

And, conversely, where both are liable it is no objection that the action is against one only; because, in an action of tort, nonjoinder of defendants is no defence.<sup>148</sup>

Mass. 29; *Erickson v. Buckley*, 230 Mass. 467, 472; *Stefani v. Freshman*, 232 Mass. 354, 357; *Haverty v. Ernst*, 232 Mass. 543.

<sup>141</sup> *O'Neil v. Squire*, 230 Mass. 294.

<sup>142</sup> *Erickson v. Buckley*, 230 Mass. 467.

<sup>143</sup> *Townsend v. Boston*, 232 Mass. 451.

<sup>144</sup> *Ibid* (ten day limitation under G. L., c. 84, § 18.)

<sup>145</sup> *Holyoke v. Hadley Co.*, 174 Mass. 424.

<sup>146</sup> As was done in *Howard v. Central Amusement Co.*, 224 Mass. 344.

<sup>147</sup> *Howard v. Central Amusement Co.*, 224 Mass. 344, 347.

<sup>148</sup> *Supra.* § 336.

§ 343. **Defences.**—The fact that the defendant's building or other structure causing injury is of a usual type or character is no defence.<sup>149</sup> On the other hand, a majority of the court held that a lessee was not liable to a foreigner who fell into a coal-hole in a portion of the premises contiguous to the sidewalk where coal covered the sidewalk, and the servants of an independent contractor were engaged in shovelling from the wagon.<sup>150</sup>

The liability of the tenant or owner, as we have seen, may be at common law, or may be defined and increased by statute or ordinance; but, in any case, the third person must be in the exercise of due care in order to recover, just as in other cases of injury.<sup>151</sup> If, however, there is any express agreement or assurance from the tenant to a third person that a certain part of the premises are safe or are in a certain condition, and the third person, relying upon such representations, is injured, the tenant will be liable, on the general principle that the third person is in the exercise of due care. Thus, where an inferior tenant agrees after using an elevator to close the trap doors, a superior tenant, who has a right to use the hoistway for storage when not in use for other purposes, is entitled to rely upon such an agreement.<sup>152</sup>

Where a landlord's defence rests upon the terms of the lease, which was executed in duplicate, he cannot be allowed to prove the contents of the lease by extrinsic evidence, merely on showing he has lost his own copy, when it appears he has made no effort to produce the tenant's copy or to summon the tenant who lived near.<sup>153</sup>

An employee of a subcontractor does not as a matter of law assume the risk of negligence by an elevator boy of the lessee; nor are such persons fellow servants.<sup>154</sup>

§ 344. **Liability insurance.**—Under the act of 1887, c. 214, a foreign insurance company may lawfully issue policies covering the liability of a landlord or a tenant for injuries to persons other than employees, or for injuries from elevators.<sup>155</sup>

<sup>149</sup> *Shipley v. Fifty Associates*, 106 Mass. 194.

<sup>150</sup> *Lorenzo v. Wirth*, 170 Mass. 596.

<sup>151</sup> *Dewire v. Bailey*, 131 Mass. 169.

<sup>152</sup> *Kent v. Todd*, 144 Mass. 478.

<sup>153</sup> *Peaks v. Cobb*, 192 Mass. 196.

<sup>154</sup> *Gardner v. Copley-Plaza Operating Co.*, 220 Mass. 372.

<sup>155</sup> *Employers' Assurance Corp. v. Merrill*, 155 Mass. 404.

As to the general subject of insurance see G. L., c. 175.<sup>156</sup>

§ 345. **Classified list of accident cases.**—For convenience of reference, the particular cases in which landlords or their tenants have been held liable to third persons for injuries are classified by nature of the objects causing the injuries as follows:

**Awnings and blinds.**—A defective or insecure awning,<sup>157</sup> or a window blind upon a building.<sup>158</sup>

**Coal-holes, etc.**—A coal-hole either in a sidewalk or in the premises contiguous to the sidewalk into which a traveller upon the street falls.<sup>159</sup>

Similarly, as to a cesspool the cover of which is not in proper position.<sup>160</sup>

**Dam; flowage.**—Neglect in the original construction or in the subsequent care and management of a reservoir dam;<sup>161</sup> or allowing pond water to escape and flood adjoining estate.<sup>162</sup>

**Drain.**—A defective drain, and a negligent repair of the same.<sup>163</sup>

**Elevators.**—Neglect or defects in the construction, protection, or care of elevators.<sup>164</sup>

<sup>156</sup> *Cp.* G. L., c. 175, §§ 24, 51, 52, 54, 152. See *Met. Life Ins. Co. v. Insurance Commissioner*, 220 Mass. 52.

<sup>157</sup> *Milford v. Holbrook*, 9 Allen, 17, 22.

<sup>158</sup> *Szathmary v. Adams*, 166 Mass. 145.

<sup>159</sup> *Lorenzo v. Wirth*, 170 Mass. 596; *Stewart v. Putnam*, 127 Mass. 403; *Dalay v. Savage*, 145 Mass. 38; *Frischberg v. Hurter*, 173 Mass. 22; *Clapp v. Donaldson*, 195 Mass. 39; *Hill v. Hayes*, 199 Mass. 411; *Wells v. Ballou*, 201 Mass. 244; *Gunning v. King*, 229 Mass. 177. *Cp.* *Burt v. Boston*, 122 Mass. 223 (stone covering of coal-cellar under sidewalk); *Clapp v. Kemp*, 122 Mass. 481 (negligence of teamster as servant of contractor).

<sup>160</sup> *Riley v. Lissner*, 160 Mass. 330.

<sup>161</sup> *Oakham v. Holbrook*, 11 Cush. 299.

<sup>162</sup> *Fiske v. Framingham Mfg. Co.*, 14 Pick. 491.

<sup>163</sup> *Murray v. Richards*, 1 Allen, 414. *Cp.* *Ingraham v. Dunnell*, 5 Met. 118.

As to case of a privy constituting a nuisance, see *McDonough v. Gilman*, 3 Allen, 264; as to a drain from a stable, *Lufkin v. Zane*, 157 Mass. 117.

<sup>164</sup> *Handyside v. Powers*, 145 Mass. 123; *Kent v. Todd*, 144 Mass. 478; *O'Malley v. Twenty-five Associates*, 170 Mass. 471; s. c., 178 Mass. 555; *Wright v. Perry*, 188 Mass. 268; *Rice v. Boston University*, 191 Mass. 30; *McManus v. Thing*, 194 Mass. 362; s. c., 202 Mass. 11; *Hamilton v. Taylor*, 195 Mass. 68; *McNamara v. Gillette Razor Co.*, 214 Mass. 163; *Gardner v. Copley-Plaza Operating Co.*, 220 Mass. 372; *Follins v. Dill*, 221 Mass. 93; *Mikkanen v. Safety Fund Nat. Bank*, 222 Mass. 150; *Waters v. Cotting*, 227 Mass. 405; *Follins v. Dill*, 229 Mass. 321; *Draper v. Cotting*,

**Floors.** An opening in a floor for passing down material to the floor below, unprovided with guards or covering.<sup>165</sup>

**Ice and snow.**—As to this subject, see *supra*, § 342.<sup>166</sup>

**Sidewalks, platforms, and approaches.**—One who creates an obstruction or a nuisance in front of his estate is liable to an action by any person receiving therefrom injuries or special damage, under the general principle of law in regard to nuisances. "The defendants therefore are plainly liable to the plaintiff if they in any way created or caused a public nuisance in the highway adjacent to their estate by means of which he, while using due care for his own protection and safety, suffered the injury to his person of which he complains. And it makes no difference how or in what manner the nuisance was created, whether it was by removing the snow from their own premises and piling it up in the public street . . . or by any other means whatsoever."<sup>167</sup> But "merely allowing an old, defective, and decaying plank sidewalk along one side of a private way to remain contiguous to the rear side of premises which have been under lease for several years, with no means of access from the premises to the sidewalk, will not render the owner of the premises responsible in damages for a personal injury sustained by one passing over the sidewalk, in consequence of its defective condition."<sup>168</sup>

So, there may be liability in the case of an uncovered cellarway without the railing required by the city ordinances,<sup>169</sup> or a cellarway defective for want of repair.<sup>170</sup> So, in the case of a wooden platform extending from the building to the

231 Mass. 51, 58; *Cussen v. Weeks*, 232 Mass. 563. *Cp. Baum v. Ahlborn*, 210 Mass. 336; *Amiot v. Foster*, 213 Mass. 573.

<sup>165</sup> *Caldwell v. Slade*, 156 Mass. 84.

<sup>166</sup> Cases of injury from ice and snow are: *Easthampton v. Hill*, 162 Mass. 302; *Kirby v. Boylston Market Association*, 14 Gray, 249; *Shipley v. Fifty Associates*, 101 Mass. 251; *s. c.*, 106 Mass. 194; *Leonard v. Storer*, 115 Mass. 86; *Clifford v. Atlantic Mills*, 146 Mass. 47; *Wixon v. Bruce*, 187 Mass. 232; *Neas v. Lowell*, 193 Mass. 441; *Holyoke v. Hadley Co.*, 174 Mass. 424; *Coman v. Alles*, 198 Mass. 99; *Cerchione v. Hunnewell*, 215 Mass. 588; *O'Neil v. Squire*, 230 Mass. 294; *Connors v. Richards*, 230 Mass. 436.

<sup>167</sup> *Merrick, J.*, in *Kirby v. Boylston Market Association*, 14 Gray, 249, 251.

<sup>168</sup> *C. Allen, J.*, in *Birnbaum v. Crowninshield*, 137 Mass. 177.

<sup>169</sup> *Boston v. Worthington*, 10 Gray, 496. See also *Churchill v. Holt*, 127 Mass. 165.

<sup>170</sup> *Lowell v. Spaulding*, 4 Cush. 277.

sidewalk.<sup>171</sup> Or a walk leading up from the sidewalk of the street to a house.<sup>172</sup>

So, where in the construction of a building a depression was left on one side of the path leading to the entrance and between the cellar window and the paved sidewalk with no grating over it.<sup>173</sup>

So, where a coal-hole was left unguarded in the sidewalk,<sup>174</sup> where the stone covering of a coal-cellar gave way owing to wear and loose supports,<sup>175</sup> and where a light in the sidewalk had worn smooth.<sup>176</sup>

So, where in a common passageway a well was left without any fence separating it from the open space, although the sides of the well had a curb fifteen inches high.<sup>177</sup>

**Signs.**—A tenant who had, in violation of a city ordinance, stretched an advertising banner on a rope across a street, was held liable to one whose window was broken by the iron staple holding the rope on which the banner was fastened, although the staple was pulled out by an extraordinary gale of wind constituting a *vis major*.<sup>178</sup>

**Stairways.**—A stairway defective in construction or lighting.<sup>179</sup>

**Steam engine.**—An engine erected in pursuance of a permit from the authorities of a city, of good construction and provided with the safety plug required by law, is not *prima facie* a nuisance for which either the owner or occupier is liable.<sup>180</sup>

**Water.**—Flooding an adjoining estate by negligence in allowing water to escape.<sup>181</sup>

<sup>171</sup> *Readman v. Conway*, 126 Mass. 374.

<sup>172</sup> *Mellen v. Morrill*, 126 Mass. 545. In this case the plaintiff was thrown down an embankment in consequence of the unsafe condition of a walk leading up to a dwelling house.

<sup>173</sup> *Larue v. Farren Hotel Co.*, 116 Mass. 97.

<sup>174</sup> See *supra*.

<sup>175</sup> *Burt v. Boston*, 122 Mass. 223.

<sup>176</sup> *Boston v. Gray*, 144 Mass. 53.

<sup>177</sup> *Learoyd v. Godfrey*, 128 Mass. 315.

<sup>178</sup> *Salisbury v. Herchenroder*, 106 Mass. 458; *Maran v. Peabody*, 228 Mass. 432.

<sup>179</sup> *Marwedel v. Cook*, 154 Mass. 235; *Hart v. Cole*, 156 Mass. 475; *Morain v. Devlin*, 132 Mass. 87.

<sup>180</sup> *Saltonstall v. Banker*, 8 Gray, 195.

<sup>181</sup> *Oakham v. Holbrook*, 11 Cush. 299; *Fiske v. Framingham Mfg. Co.*, 14 Pick. 491.

§ 345a. **Liability for trespass.**—Where a tenant has committed a trespass, as by invading the adjoining land with stones for the foundation of a building, he is liable in damages, or, if the trespass is continuous he may be enjoined in equity, and ordered to remove the stones.<sup>182</sup>

But, in such a case, the landlord cannot be ordered as part of the relief to execute and deliver an instrument releasing any right in the plaintiff's land; for it cannot be presumed that the landlord would take advantage of his tenant's tort, and he cannot derive any title under the lease.<sup>183</sup>

§ 346. **Liability in equity.**<sup>184</sup>—Where the third person brings a bill in equity against a tenant to enjoin a nuisance, and it appears that he is entitled to the relief sought, but that pending proceedings his interest in the property injuriously affected by the nuisance has determined, yet the bill will be retained for the assessment of damages.<sup>185</sup>

Where both the landlord and the tenants are guilty of a breach of a covenant between the landlord and a third party, for keeping a common passageway open and uninterrupted, a bill in equity will lie against both in favor of such third person.<sup>186</sup>

§ 347. **Liability for mechanics' liens.**<sup>187</sup> It is provided by statute that, if the person for whom work is done or materials are furnished has an estate less than a fee simple in the land, the lien shall bind such person's whole estate and interest in the property.<sup>188</sup> This provision has been held<sup>189</sup> to create expressly a lien against the estate of a lessee under the statutes relating to such liens.<sup>190</sup>

<sup>182</sup> *Brooks v. Rosenbaum*, 217 Mass. 172.

<sup>183</sup> *Ibid.*

<sup>184</sup> See, as to trespass, *supra*, § 345a.

<sup>185</sup> *Case v. Minot*, 158 Mass. 577, 589; *Brande v. Grace*, 154 Mass. 210. *Cp. St.* 1887, c. 383, authorizing such relief in equity as may seem proper.

<sup>186</sup> *Commercial Wharf Co. v. Winsor*, 146 Mass. 559.

<sup>187</sup> See generally, *Lummus on Liens* (1894), §§ 261 (e), 291, 296; 2 *Jones on Liens*, 2d ed., §§ 1272–1282; *Overton on Liens*, §§ 557, 558; *Phillips, Mech. Liens*, § 192; *Boisot, Mech. Liens*, §§ 133, 134, 289–299; 1 *Taylor, Landl. & Ten.*, 9th ed., § 174.

<sup>188</sup> *G. L.*, c. 254, § 25; *R. L.*, c. 197, § 32; *Pub. St.*, c. 191, § 36; *Gen. St.*, c. 150, § 33; *Rev. St.*, c. 117, § 26; *St.* 1855, c. 431. See *See v. Kolodny*, 227 Mass. 446. As to liens of subcontractors, see *G. L.*, c. 254.

<sup>189</sup> *McCue v. Whitwell*, 156 Mass. 205; *Forbes v. Mosquito Fleet Yacht Club*, 175 Mass. 432.

<sup>190</sup> *G. L.*, c. 254; *R. L.*, c. 197; *Pub. St.*, c. 191; *St.* 1892, c. 191; *St.* 1888,

As a lien is created against the estate of the lessee, "the statute cannot be construed to give at the same time . . . a lien against the estate in reversion;"<sup>191</sup> and this is not altered by the existence of an express covenant in the lease whereby the lessee agrees to make certain alterations<sup>192</sup> and to keep the building in repair.<sup>193</sup> The lien is to be enforced subject to the terms and conditions of the lease.<sup>194</sup>

Probably the estate of a tenant at will is not within the statute, and is not subject to a lien in this Commonwealth.<sup>195</sup> It has been held that one who enters under an agreement to purchase, and who is therefore, as we have seen, to some purposes a tenant at will,<sup>196</sup> cannot give the consent required to establish a lien upon the estate for work done upon a building erected by him; and this is true, although the vendor knew of the vendee's intention to build, and made no objection to the progress of the work.<sup>197</sup> Nor, under such circumstances, can the lien be enforced against the estate of the vendor.<sup>198</sup>

On the other hand, if the vendee is under an agreement with the owner to erect a building or other structure for which a lien is given, this agreement operates as a consent of the vendor so as to bind the estate.<sup>199</sup> So a lien may be enforced against a building erected by a lessee which he is required

c. 344; St. 1894, c. 283, c. 547; St. 1897, c. 381; St. 1893, c. 396, § 12; St. 1890, c. 383; St. 1895, c. 404; St. 1891, c. 244; St. 1900, c. 256.

<sup>191</sup> Knowlton, J., in *McCue v. Whitwell*, 156 Mass. 205.

<sup>192</sup> *Francis v. Sayles*, 101 Mass. 435.

<sup>193</sup> *Ibid.*; *Conant v. Brackett*, 112 Mass. 18.

<sup>194</sup> *Boisot*, *Mech. Liens*, § 133; *Phillips*, *Mech. Liens*, § 192.

<sup>195</sup> See *Boisot*, *Mech. Liens*, § 134; *Thaxter v. Williams*, 14 Pick. 49, 54; *Hayes v. Fessenden*, 106 Mass. 228, 231.

<sup>196</sup> *Supra*, § 157.

<sup>197</sup> *Hayes v. Fessenden*, 106 Mass. 228; *Metcalf v. Hunnewell*, 1 Gray, 297; *Peabody v. Methodist Society*, 5 Allen, 540; *Howard v. Veazie*, 3 Gray, 233; *Courtemanche v. Blackstone Valley Ry. Co.*, 170 Mass. 50.

<sup>198</sup> *Hayes v. Fessenden*, 106 Mass. 228; *Wells v. Banister*, 4 Mass. 514; *Tripp v. Hathaway*, 15 Pick. 47; *Stone v. Crocker*, 19 Pick. 292.

<sup>199</sup> *McCue v. Whitwell*, 156 Mass. 205; *Hilton v. Merrill*, 106 Mass. 528; *Saunders v. Bennett*, 160 Mass. 48; *Smith v. Norris*, 120 Mass. 58; *Worthen v. Cleaveland*, 129 Mass. 570; *Mulrey v. Barrow*, 11 Allen, 152; *Carew v. Stubbs*, 155 Mass. 549; *Borden v. Mercer*, 163 Mass. 7; *Davis v. Humphrey*, 112 Mass. 309.



by the terms of the lease to erect, although the agreement is such that the building remains personal property.<sup>200</sup>

§ 348. **Liability to gas and electric companies.**—"A gas or electric light company may stop gas or electricity from entering the premises of any person failing to pay the amount due therefor or for the use of the meter or other article hired by him from such company; and, for such purpose, the officers, servants or workmen thereof may, after twenty-four hours' notice, enter his premises between the hours of eight in the forenoon and four in the afternoon and separate and take away such meter or other property of the company, and may disconnect any meter, pipe, wires, fittings or other works, whether they are property of the company or not, from its mains, pipes, or wires."<sup>201</sup>

"A gas or electric light company shall not refuse to supply gas or electricity for any building or premises to a person applying therefor who is not in arrears to it for any gas or electricity previously supplied to him, because a bill for gas or electricity remains unpaid by a previous occupant of such building or premises."<sup>202</sup>

Thus the company cannot refuse to supply gas to a voluntary assignee of a corporation because of an unpaid bill of the corporation.<sup>203</sup>

For a violation of this section the plaintiff has a remedy at law by mandamus, and cannot go into equity for a mandatory injunction, the failure to supply gas being a negative act.<sup>204</sup>

Payment may be required in advance or a deposit demanded.<sup>205</sup> So, if the consumer fails to pay, the right of the company to cut off the gas is undoubted.<sup>206</sup> Whether, if gas

<sup>200</sup> *Forbes v. Mosquito Fleet Yacht Club*, 175 Mass. 432, overruling *dicta* in *Hayes v. Fessenden*, 106 Mass. 228, 231, and *Stevens v. Lincoln*, 114 Mass. 476, 478. *Cp.* *Belding v. Cushing*, 1 Gray, 576; *Poor v. Oakman*, 104 Mass. 309.

<sup>201</sup> G. L., c. 164, § 124; R. L., c. 58, § 16; St. 1894, c. 316; Pub. St., c. 61, § 16; St. 1861, c. 168, § 12; *Cox v. Malden, etc., Gas Light Co.*, 199 Mass. 324.

<sup>202</sup> G. L., c. 164, § 125; R. L., c. 58, § 17; St. 1894, c. 299; *Cox v. Malden, etc., Gas Light Co.*, 199 Mass. 324.

<sup>203</sup> *Cox v. Malden, etc., Gas Light Co.*, 199 Mass. 324.

<sup>204</sup> *Cox v. Malden, etc., Gas Light Co.*, 199 Mass. 324, 327.

<sup>205</sup> *Turner v. Revere Water Co.*, 171 Mass. 329.

<sup>206</sup> *Ibid.*



is supplied to the owner of several houses under separate contracts, a failure to pay the bill on one house authorizes cutting off the gas from other houses, *quære*. In other States, it has been held not to give authority.<sup>207</sup>

§ 349. **Liability to water companies.**—"A corporation engaged in selling or distributing water, which refuses or neglects to furnish or supply water to or for any building or premises for the reason that a water bill remains unpaid by a previous owner or occupant of said building or premises shall, unless the person applying for water is in arrears to such corporation for water previously furnished to or for any building or premises, be punished by a fine of not less than ten nor more than twenty dollars."<sup>208</sup>

A usual provision in the charter of water companies is as follows: "The occupant of any tenement shall be liable for the payment of the price or rent for the use of water in such tenement; and the owner shall also be liable, if on being notified of such use, he does not object thereto."<sup>209</sup>

The general statute above cited is not retroactive,<sup>210</sup> but even before its enactment it was unlawful for a water company to refuse to furnish a lessee with water on the ground that the lessor had not paid for water used prior to the lease; and a regulation "that in all cases of non-payment of rates for fifteen days after the same are due, the water may be shut off without further notice, and not be turned on again until rates are paid," is unreasonable and void so far as it tries to give such a right.<sup>211</sup>

The court said,<sup>212</sup> "Our legislature has never authorized the making of an unpaid water rate a lien or charge upon the land. It has authorized holding the owner liable, after notice, in some charters, for the debt of a tenant, but in no instance has a tenant been held liable for the debt of an owner."<sup>213</sup>

<sup>207</sup> *Turner v. Revere Water Co.*, 171 Mass. 329, and cases cited.

<sup>208</sup> G. L., c. 270, § 13; R. L., c. 213, § 10; St. 1898, c. 168. Cited in *Turner v. Revere Water Co.*, 171 Mass. 329.

<sup>209</sup> For an index to charters in various towns, see *Turner v. Revere Water Co.*, 171 Mass. 329, 333.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*

<sup>212</sup> *Ibid.*, p. 334, per Lathrop, J.

<sup>213</sup> *Cp. Lumbard v. Stearns*, 4 Cush. 60; *Young v. Boston*, 104 Mass. 95; *Merrimack River Savings Bank v. Lowell*, 152 Mass. 556.

It is apparently proper, however, to demand payment in advance, or to require a deposit.<sup>214</sup> Whether an owner could order water shut off during the year and recover a part of what he paid in advance, *quære*.<sup>215</sup> But if the consumer fails to pay the right to shut off the water is undoubted.<sup>216</sup>

If the lessee pays the rates, he cannot collect of the lessor, in the absence of express agreement.<sup>217</sup>

## SECTION II

### RIGHTS AGAINST THIRD PARTY

§ 350. **Rights of the landlord.**—In general.<sup>218</sup>—An action will not lie against a third person by the landlord for an interruption to the possession of his tenant, whether he be tenant for years or tenant at will.<sup>219</sup>

“Since this change of the law,<sup>220</sup> regulating the manner of terminating estates at will, the possession of the tenant at will

<sup>214</sup> *Turner v. Revere Water Co.*, 171 Mass. 329.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*, p. 336.

<sup>217</sup> *Leighton v. Ricker*, 173 Mass. 564.

<sup>218</sup> As to eminent domain, see *supra*, §§ 138, 139, 170.

<sup>219</sup> *French v. Fuller*, 23 Pick. 104; *Baker v. Sanderson*, 3 Pick. 348, 352; *Hastings v. Livermore*, 7 Gray, 194, 197; *Hersey v. Chapin*, 162 Mass. 176; *Geer v. Fleming*, 110 Mass. 39. *Cp. Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80; *Sparhawk v. Bagg*, 16 Gray, 583; *Bascom v. Dempsey*, 143 Mass. 409; *Woodman v. Francis*, 14 Allen, 198.

As to the party to bring the action in the case of letting on shares, see *supra*, § 211.

See also the analogous case, in respect of personal property, of *Wheeler v. Train*, 3 Pick. 255. In this case, the owner of personal property which he had leased to another, brought an action of replevin against a sheriff who had attached the property on a writ against the lessee, and it was held that the action could not be maintained.

*Historical.* Before Rev. St., c. 60, § 26, tenants at will held strictly at the will of the landlord, and apparently the landlord might bring an action for an injury to the tenant's possession, on the ground that it was substantially his possession. See *Starr v. Jackson*, 11 Mass. 519, for a discussion of authorities; *Hingham v. Sprague*, 15 Pick. 102; *Cushing v. Adams*, 18 Pick. 110; *Shaw v. Cummiskey*, 7 Pick. 76; also *Sumner v. Tileston*, 7 Pick. 198, where it is said, p. 201, that the possession of a tenant at will is the possession of the landlord, but where it appeared that the injury complained of took place while the landlord was in possession.

<sup>220</sup> Rev. St., c. 60, § 26.

before notice, and for three months after, can in no sense be held to be the possession of the landlord. The tenant has not only the possession but also the right of possession, and, in this respect, he stands on the same footing as a tenant for a term certain.”<sup>221</sup> If there is doubt whether the possession was in the landlord or the tenant at the time of the trespasses complained of, it is a question for the jury;<sup>222</sup> but if there is a mixed possession of both the landlord and the tenant, the landlord may maintain the action.<sup>223</sup>

The rule above stated proceeds upon the principle that the right of possession being in the tenant, and not in the landlord, the latter has suffered no injury. Therefore, where there has been an injury done to the premises of such a kind as to affect the landlord’s reversionary interest, he may have an action of tort therefor.<sup>224</sup> The declaration should allege that the acts of the defendant were an injury to the reversion.<sup>225</sup>

An averment that the plaintiff is seized in fee of the premises virtually includes an averment of occupation or possession;<sup>226</sup> and, though the plaintiff has not occupied the prem-

<sup>221</sup> French v. Fuller, 23 Pick. 104, 107, per Wilde, J.

<sup>222</sup> Woodman v. Francis, 14 Allen, 198.

<sup>223</sup> Ibid., p. 200.

<sup>224</sup> Baker v. Sanderson, 3 Pick. 348; French v. Fuller, 23 Pick. 104; Starr v. Jackson, 11 Mass. 519; Lienow v. Ritchie, 8 Pick. 235; Hingham v. Sprague, 15 Pick. 102; Cushing v. Adams, 18 Pick. 110; Ashley v. Ashley, 4 Gray, 197; Hastings v. Livermore, 7 Gray, 194; Cushing v. Kenfield, 5 Allen, 307; Bartlett v. Boston Gas Light Company, 122 Mass. 209, 216; Anthony v. New York, etc., Railroad, 162 Mass. 61; Hersey v. Chapin, 162 Mass. 176; Geer v. Fleming, 110 Mass. 39; Thoreau v. Pallies, 1 Allen, 425. See Allen v. Thayer, 17 Mass. 299, 302; Dorrell v. Johnson, 17 Pick. 263; Rising v. Stannard, 17 Mass. 282; Danforth v. Sargent, 14 Mass. 491. Cp. Barnstable v. Thacher, 3 Met. 239; Hubbard v. Little, 9 Cush. 475; Shrewsbury v. Smith, 14 Pick. 297; Putney v. Dresser, 2 Met. 583.

*Historical.* Under the old system of pleading, the appropriate action by the landlord for an interest to his reversionary interest was an action on the case, and not *quare clausum fregit*. French v. Fuller, 23 Pick. 104, 107. See Starr v. Jackson, 11 Mass. 519; Lienow v. Ritchie, 8 Pick. 235; Ashley v. Ashley, 4 Gray, 197.

Under the old law also, where a wife was seized of the land in her right, the husband could either sue alone for an injury by a stranger or might join the wife also. Cushing v. Adams, 18 Pick. 110.

<sup>225</sup> Bascom v. Dempsey, 143 Mass. 409; Woodman v. Francis, 14 Allen, 198; Dearborn v. Wellman, 130 Mass. 238.

<sup>226</sup> Cushing v. Adams, 18 Pick. 110.

ises personally, yet an open, peaceable, exclusive and adverse possession by means of tenants, under a claim of title in fee known to the defendant, will support an action against one who claims only a right of way.<sup>227</sup>

§ 351. **Action at law.**—The injury may be of any sort affecting the soil, buildings or interest of the landlord. Thus, a diminution of the water supplied to the landlord's mills, though not a cause of action in itself, becomes so if the landlord has leased the mills and is obliged to reduce his rents in consequence.<sup>228</sup> And the stoppage of a watercourse which had drained the plaintiff's land, whereby it was rendered marshy and unfit for use and whereby a right of way was injured, is a ground of action.<sup>229</sup> In such a case, the fact that the plaintiff had an opportunity to drain into a public sewer does not bar the remedy, though it may diminish the damages.<sup>230</sup> It is sufficient to allege that the plaintiff was seized and possessed of a certain lot of land from which the water was accustomed to flow through land of the defendant, without setting forth any title to the watercourse or prescriptive right.<sup>231</sup>

So, the obstruction of a right of way appurtenant to land which is occupied by a tenant at will may be an injury to the lessor, although it does not injure the reversion nor cause a reduction in the rent.<sup>232</sup> The court said as to this matter in one case:<sup>233</sup> "The obstruction might have been prejudicial to the plaintiffs: for they had a right to enter at any time to terminate the lease at will, or to make repairs, and might have been prevented from so entering by the obstructions, and might thus be induced to continue a disadvantageous lease, or to suffer the tenements to be injured for the want of seasonable repairs." So, a claim of a right of way and the erection of a fence which closes doors and windows on the premises.<sup>234</sup>

So, breaking and entering a house, removing a blind and

<sup>227</sup> *Thoreau v. Pallies*, 1 Allen, 425.

<sup>228</sup> *Baker v. Sanderson*, 3 Pick. 348.

<sup>229</sup> *Ashley v. Ashley*, 4 Gray, 197; *Hastings v. Livermore*, 7 Gray, 194.

<sup>230</sup> *Hastings v. Livermore*, 7 Gray, 194.

<sup>231</sup> *Ashley v. Ashley*, 4 Gray, 197.

<sup>232</sup> *Cushing v. Adams*, 18 Pick. 110.

<sup>233</sup> *Ibid.*, Wilde, J., p. 113.

<sup>234</sup> *Thoreau v. Pallies*, 1 Allen, 425.

breaking window glass is such an injury to the reversion that the landlord may sue therefor.<sup>235</sup> So, the taking of premises by a board of health for a smallpox hospital, where the consent of the owner is necessary to make such taking valid.<sup>236</sup> Where a tenant commits waste by selling the products of the soil or farm to a third person without right, the landlord may maintain an action of tort against such third person to recover damages for removing the property, and likewise for entering the premises for the purpose of taking it away.<sup>237</sup>

§ 352. **Remedy in equity.**—A landlord may likewise have a remedy in equity to prevent an injury to his reversionary interest, where the same is likely to be serious and irrevocable,<sup>238</sup> and in such suit may recover damages for injury already sustained.<sup>239</sup> In a certain case, the defendants were charged with polluting the water of a stream on which the plaintiff's cotton mill was situated, with drugs, dye stuffs and other noxious preparations, whereby the water had become corrupt, unwholesome, and unfit for use, so that the plaintiff with his workmen, tenants and their families could not have the use of it as they should have. ["A reversioner's] remedy is by an action at law, and a court of equity will not interpose its authority unless it can be shown to be necessary to prevent future mischief, and such a mischief as ought to be prevented . . . that sort of material injury by one to the comfort of another, or to his damage, which requires the application of a power to prevent as well as to remedy. . . . A court of equity is extremely unwilling, as Eden remarks, to interpose without a trial at law, especially where the alleged nuisance consists in the exercise of a manufacture.<sup>240</sup> More especially,

<sup>235</sup> *Cushing v. Kenfield*, 5 Allen, 307.

<sup>236</sup> *Hersey v. Chapin*, 162 Mass. 176.

<sup>237</sup> Thus in *Daniels v. Pond*, 21 Pick. 367, a tenant at will sold manure made in the course of husbandry on the farm, and which, therefore, he had no right to sell (see *supra*, §§ 210, 221), and it was held the purchaser was liable to the landlord both in trespass *de bonis asportatis* and trespass *quare clausum fregit*.

<sup>238</sup> *Ingraham v. Dunnell*, 5 Met. 118; *Stockbridge Iron Company v. Cone Iron Works*, 102 Mass. 80. In *Peters v. Stone*, 193 Mass. 179, a landlord was granted an injunction to prevent the removal of buildings erected by a lessee which had become his property.

<sup>239</sup> *Breed v. Lynn*, 126 Mass. 367; *Stockbridge Iron Company v. Cone Iron Works*, 102 Mass. 80.

<sup>240</sup> Eden on Injunctions, 236.

it may be added, where the works complained of are of great value, and a perpetual injunction might be ruinous, and in all cases, where the right is doubtful, the court will direct a trial; and in the meantime, if there be danger of irreparable mischief, or if there is any other good cause for granting a temporary injunction, it will be ordered, so as to restrain all injurious proceedings; and when the plaintiff's right is fully established, a perpetual injunction will be decreed."<sup>241</sup>

§ 353. **Damages.**—Where the owner of a wharf let it to a partnership of which she was a member, and owing to the acts of the city in which the wharf was situated, in depositing sewage between the wharf and the sea, the expenses of the firm were increased, it was held in a bill in equity by the owner against the city, that such increased expenses could not be allowed to the owner individually as damages.<sup>242</sup> Where part of a tract of land containing ore beds was under lease, and a trespasser entered the part not leased and took ore, a finding that such ore was worth a sum less than that to be paid as royalty by the lessee is reasonable; but the value of the ore wrongfully taken is to be estimated as it lay in the bed, and not after the trespasser has increased its value by removing it.<sup>243</sup>

§ 354. **Contributory negligence of tenant.**—But the landlord cannot recover damages from a third person for an injury occasioned partly by such third person and partly by the contributory negligence of his tenant. Thus, in an action by the owner of a reversionary interest against a gas company, for injury caused by an explosion of gas in the cellar, the court said: "The ruling at the trial was substantially that no degree or kind of negligence on the part of the tenant would affect the plaintiff's right to recover. This we think was erroneous. . . . Whatever of care was requisite for the protection of the premises under the circumstances was due from the occupant. The defendant, as well as the plaintiff, had a right to expect and require it of him. . . . This conclusion does not rest upon the ground of any personal relation of agency between the landlord and his tenant, but upon the relation of the latter to the property as having the present control and charge of it, and therefore the one upon whom is

<sup>241</sup> *Ingraham v. Dunnell*, 5 Met. 118, 125, 126.

<sup>242</sup> *Breed v. Lynn*, 126 Mass. 367.

<sup>243</sup> *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80.

devolved the duty to take reasonable care to prevent damage from such causes.”<sup>244</sup> And in a later trial of the same case,<sup>245</sup> the Court said: “In a previous stage of this case it was indeed decided that this action could not be maintained if the injury was caused in part by the negligence of the tenant in possession. . . . That conclusion follows from the application of a familiar rule, in actions of this description, which requires the plaintiff to be free from fault; and of another rule, which imputes to him the negligence of the person to whom he has intrusted the charge and control of the property injured. In this sense only is the tenant, under the last rule, regarded as owner, or identified with the owner of the property.” The court then held that a judgment against the tenant in a suit by him against the third person was no bar to the action then pending.

A landlord has no remedy against a mortgagee of a tenant's personal property, where the tenant has left such property behind on leaving the premises, and the mortgagee refuses to take possession of the goods or to pay the landlord for storing them.<sup>246</sup>

§ 355. **Rights of the tenant.**<sup>247</sup>—A tenant for years or at will may maintain an action of tort in the nature of trespass *quare clausum fregit* against a stranger who enters without right.<sup>248</sup> So, he may maintain an action of tort against one who injures the soil or the buildings upon it;<sup>249</sup> but he must, of course, be himself free from negligence in order to recover.<sup>250</sup>

<sup>244</sup> *Bartlett v. Boston Gas Light Co.*, 117 Mass. 533, 538, per Wells, J.

<sup>245</sup> 122 Mass. 209, 216, Colt, J.

<sup>246</sup> *Field v. Roosa*, 159 Mass. 128.

<sup>247</sup> As to suit against an officer serving civil process, see *supra*, § 4; and as to actions for trespass where there is an agreement between landlord and tenant as to the cultivation of crops, see *supra*, § 211.

<sup>248</sup> *Kimball v. Grand Lodge*, 131 Mass. 59; *Martin v. Tobin*, 123 Mass. 85.

<sup>249</sup> *Starr v. Jackson*, 11 Mass. 519; *Baker v. Sanderson*, 3 Pick. 348, 352; *Ashley v. Ashley*, 4 Gray, 197; *Hastings v. Livermore*, 7 Gray, 194, 198; *Kimball v. Grand Lodge*, 131 Mass. 59 (dictum); *Anthony v. N. Y., Providence & Boston R. R.*, 162 Mass. 60, 62; *Dickinson v. Goodspeed*, 8 Cush. 119; *Moeckel v. Cross & Co.*, 190 Mass. 280.

*Historical.* The proper form of action under the old pleading was trespass *quare clausum fregit*. But apparently case might also lie where the damage was consequential. See *Starr v. Jackson*, 11 Mass. 519; *Ashley v. Ashley*, 4 Gray, 197.

<sup>250</sup> *Bartlett v. Boston Gas Light Co.*, 117 Mass. 533; s. c., 122 Mass. 209.



But a constable is not liable in trespass, in serving an execution for possession, for removing the furniture thus obliging the tenant's family to leave, nor for shouting and shaking his fist at the family he if does not come within striking distance.<sup>251</sup>

Where a tenant is obliged by the terms of the lease to keep the premises in first-class condition and to deliver them up in good order at the end of the lease, the fact that the lessee is not bound to repair damages by fire or other unavoidable casualties, will not prevent his recovering for negligence and maintaining a nuisance by which the premises are injured.<sup>252</sup>

In some cases, the landlord may be liable to the tenant, not *qua* landlord but *qua* landowner; in other words he is practically a third party.<sup>253</sup>

Where there was a provision in a lease that the lessees, in case of the destruction of buildings, should have the right to rebuild and to keep any insurance money, and the buildings were destroyed by a fire kindled by sparks from the defendant's locomotives, it was held that the lessees should have the sole right to recover damages, as if they were bailees of the buildings as personal property.<sup>254</sup> In *Richards v. Gaufret*,<sup>255</sup> it was queried whether one who was lessee of an exclusive right to cut ice from a pond had such an interest that he could maintain trespass *quare clausum*, or whether he had such property in the ice that he could maintain an action of trover but it was held that his interest was more than a license, and that he could recover damages in an action of tort for any interference therewith.

Where premises are leased, and one forcibly enters on the tenant, the latter is the proper party to bring the action,<sup>256</sup> and not the landlord;<sup>257</sup> and inasmuch as the peaceful possession of premises gives a right to bring the action, a tenant at will may maintain it against a stranger who forcibly enters and ousts him.<sup>258</sup>

<sup>251</sup> *Keith v. Rosnosky*, 231 Mass. 409.

<sup>252</sup> *Moeckel v. Cross & Co.*, 190 Mass. 280 (greenhouses injured by gasoline explosion).

<sup>253</sup> See *Riley v. Lissner*, 160 Mass. 330.

<sup>254</sup> *Anthony v. New York, etc., Railroad Co.*, 162 Mass. 61.

<sup>255</sup> 145 Mass. 486.

<sup>256</sup> *Walker v. Sharpe*, 14 Allen, 43.

<sup>257</sup> *Commonwealth v. Bigelow*, 3 Pick. 31.

<sup>258</sup> *Walker v. Sharpe*, 14 Allen, 43.



The tenant, like the landlord, may maintain a bill in equity to prevent nuisance or trespass which injures his interest. Thus, a bill will lie against a tenant of an upper floor of a building who allows sand, acids, smoke or other noxious substances to flow down into the premises of a tenant below him whereby the latter's goods are injured, even though the aggressor may find it necessary for his business.<sup>250</sup>

§ 356. Rights of both landlord and tenant.<sup>260</sup>—Where an injury has been done affecting both the reversionary and the present interest, the landlord and the tenant may each maintain an action for the injury to his interest;<sup>261</sup> and, where the same person has the reversion and is also in occupation, he may recover damages for both injuries.<sup>262</sup>

Where there has been an injury done to the reversion, a judgment for the defendant in an action by the tenant is no bar to an action by the landlord. This is illustrated in the case of *Bartlett v. Boston Gas Light Co.*<sup>263</sup> "In a previous stage of this case it was indeed decided that this action could not be maintained, if the injury was caused in part by the negligence of the tenant in possession.<sup>264</sup> That conclusion follows from the application of a familiar rule in actions of this description, which requires the plaintiff to be free from fault; and of another rule, which imputes to him the negligence of the person to whom he has intrusted the charge and control of the property injured. In this sense only is the tenant, under the last rule, regarded as owner, or identified with the owner of the property. It fails to establish that privity which makes the judgment offered conclusive in this case. The conduct of the tenant affects the plaintiff's right to recover for the injury, in the same way that it affects the right of the tenant to recover for his own injury. But no

<sup>250</sup> *Boston Ferrule Co. v. Hills*, 159 Mass. 147.

*Cp. Standard Tire & Rubber Co., v. Richardson & Bros.*, 231 Mass. 374 (damage from sprinkler system).

<sup>260</sup> As to actions by the landlord and the tenant, and the consolidation of actions, in eminent domain cases, see *supra*, § 139.

<sup>261</sup> *Starr v. Jackson*, 11 Mass. 519, 520, per Parker, C. J.; *Anthony v. New York, etc., Railroad*, 162 Mass. 61.

<sup>262</sup> *Ashley v. Ashley*, 4 Gray, 197; *Woodman v. Francis*, 14 Allen, 198, 200.

<sup>263</sup> 122 Mass. 209, 216, per Colt, J.

<sup>264</sup> 117 Mass. 533.

identity of interest is established in the subject matter of either action; no mutual or successive relationship to the same rights of property involved is shown; the plaintiff was in no sense surety for the conduct of his tenant; neither party represents the other in either action. It is not enough that both actions were brought to recover damages for injury from the same cause, and were supported by the same evidence. The judgment here offered is not a bar to this action; is not conclusive evidence, between these parties, of the facts in issue; and was not offered if it be competent for that purpose, as *prima facie* evidence, or as evidence of the fact that such a judgment was rendered."

But no arrangement, contract or demise between the owners of different interests in the premises can make the third person liable for more than the whole damage to the property whether there be action brought by one or by more.<sup>285</sup>

Where a landlord brings a bill in equity to enjoin a nuisance, which continued in part during a period when the premises were under demise, the tenant must be joined as co-plaintiff.<sup>286</sup>

<sup>285</sup> *Anthony v. New York, P. & B. R. R. Co.*, 162 Mass. 61, 63; *Burt v. Merchants Ins. Co.*, 115 Mass. 1, 15; *Edmands v. Boston*, 108 Mass. 535; *Turner v. Robbins*, 133 Mass. 207.

<sup>286</sup> *Ingraham v. Dunnell*, 5 Met. 118.

Apparently after a hearing upon the merits and after the expiration of the tenant's term, the landlord cannot amend his bill by making the tenant a party. *Ibid.*

# APPENDIX OF FORMS

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## PART I

### FORMS OF WRITTEN INSTRUMENTS

The size of this book forbids anything more extensive than a collection of the more common forms in general use. For other precedents see, generally, 2 Platt on Leases, 577-815; Woodfall, Landl. & Ten., 16th ed., 941-991; 2 Taylor, Landl. & Ten., 9th ed., 429-533; Jones Legal Forms, 7th ed., 891-1019; Birdseye's Abbott's Clerks' and Conveyancers' Assistant, 3d ed., 976-1122; 3 Bythewood's Precedents in Conveyancing, 4th ed., 341-639.

#### A. PROVISIONS OF LEASES

##### 1. *Reservations*

###### **Form 1. Passageway.**

Excepting and reserving to the lessor, his heirs and assigns, the use at all times and for all purposes, in common with the lessee, his executors, administrators or assigns, a certain passageway ten feet wide, leading from *State Street* along the westerly boundary of said premises to the rear part thereof.

###### **Form 2. Timber and minerals.**

Excepting and reserving to the lessor, his heirs and assigns all timber and trees now standing or growing, or which may hereafter be standing or growing, upon said premises, and all minerals in, upon or under the same; but the lessor shall not cut or remove such timber or trees, or dig for such minerals except with the previous written consent of the lessee.

## FORMS OF WRITTEN INSTRUMENTS

### 2. Covenants

#### Form 3. To pay rent.

And the said lessee for himself and his executors, administrators, and assigns does hereby covenant to and with the said lessor and his heirs and assigns that he or they will pay the said rent monthly in equal sums of *ten dollars*, the first of which payments shall be made on the *first day of April*, A. D. 1899, and that he or they will pay rent after the same rate for such further time as he the said lessee or those claiming under him may hold the premises.

#### Form 4. Guaranty of rent.

(*To be endorsed on lease.*)

In consideration of the making of the within written lease, I, A. B., do covenant with the lessor named therein and his heirs, executors, administrators, and assigns, that if any default shall be made by the lessee named therein, his executors, administrators, and assigns, in the performance of any of the within covenants on his part to be performed, I will pay the said rent or any arrears thereof remaining due, and all damages arising from the breach of said covenants or either of them, without notice of such default from the lessor or other person having his estate in the premises. Witness my hand and seal this *third day of May*, 1860.

#### Form 5. — Another form.

In consideration of the within written lease, and of one dollar to me paid, the receipt whereof is hereby acknowledged, I do hereby guarantee to the said F. W. [*lessor*] and his assigns the true and punctual payments of the rents and water taxes and in the manner therein mentioned, and in default thereof I promise to pay the same on demand.

Witness my hand and seal this *twenty-first day of April*, A. D. 1882.

#### Form 6. — Short form.

I, A. B., hereby guarantee the performance of the covenants of the within named [*lessee*] as within expressed. Witness my hand and seal this *third day of May*, 1899.

## COVENANTS IN LEASES

### **Form 7. — Cut timber as guaranty.**

It is agreed and understood by the parties to this instrument that the wood and timber on the above described premises shall be held by the lessor as guaranty for the payment of rent and interest.

### **Form 8. Lien on personal property of lessee.**

It is further agreed that said lessor shall have a first lien prior to all others upon the safe, counters, show cases and other furniture and fixtures that may be contained in the said store, or that may be placed therein by said lessee for the payment of the rent above specified, and in case said rent shall not be paid as agreed by the lessee, then said furniture and fixtures shall become the property of said lessor, without process of sale thereof on execution or without other legal process.

### **Form 9. To pay taxes.**

And will pay all taxes, water-rates, and assessments to which said premises or any part thereof may be or become liable during said term.

### **Form 10. — Another form.**

The lessor for himself and his legal representatives agrees to pay all taxes that may be assessed thereon during the term of this lease. The lessee for himself and his legal representatives in this behalf agrees to pay all costs, expenses, and charges, except the yearly taxes.

### **Form 11. — Exception as to permanent benefits.**

Excepting, however, all assessments for any permanent benefit or improvement to said premises under any betterment law or otherwise, for or by reason of which they [*the lessee, his executors, etc.*] shall not be liable to make any payment.

### **Form 12. To insure.**

And said lessees, for themselves and those having their estate in the premises, hereby covenant with the said lessor and his heirs and assigns that they will during said term pay all extra insurance upon the demised premises occasioned by any

## FORMS OF WRITTEN INSTRUMENTS

use to which the same may be put by the lessees or those claiming under them.

And the lessor covenants for himself and his heirs and assigns, with the lessees and those having their estate in the premises, that he will keep the premises well insured, the lessees as hereinbefore provided paying for extra insurance occasioned by the use to which the premises may be put by them or those claiming under them.

### **Form 13. Repairs and redelivery.**

And will keep all and singular the said premises in such repair as the same are in at the commencement of said term or may afterwards be put in by the lessor or his heirs or assigns, reasonable use and wearing thereof and damage by fire or other unavoidable casualties only excepted, and at the end of said term will peaceably deliver up to the lessor or his heirs or assigns the said premises, together with all future erections or additions upon or to the same, in such repair as aforesaid, and in good and tenantable order and condition.

### **Form 14. — Another form.**

To make at the sole cost and expense of the said lessee and in a thorough and workman-like manner, with materials as good in quality as those now in use in the said premises, all such repairs as may be necessary to maintain the said premises, including all the landlord's fixtures therein or thereon, which are now admitted to be whole and in good order and condition, in the same condition as the same are in at the beginning of the said term, or may be put in during the continuance thereof, and to deliver up to the said lessor, at the expiration of the within term, the said premises, together with all future erections or additions on or to the same, in such repair and condition as aforesaid, vacant and unencumbered.

### **Form 15. — Another form.**

And in addition to the rents to be paid as aforesaid the said party of the second part agrees to keep all the said buildings, appurtenances, and improvements in good repair, and also to maintain an amount of insurance upon all the said buildings

## COVENANTS IN LEASES

sufficient to repair or replace them in case of destruction or damage by fire. Said repair and insurance to be at the cost of said party of the second part, and it is expressly understood and agreed by said party of the second part that if any building shall be destroyed or damaged by fire, it shall be rebuilt or repaired by said party at once, unless this requirement shall be waived by the party of the first part, in which case all moneys received by and in the hands of the party of the second part for insurance on the damaged or destroyed property shall be promptly paid to said party of the first part, their heirs or assigns. If said party of the second part shall desire to alter or remove any building, appurtenances, or improvements on said premises, or to place any new building, appurtenances, or improvements upon the same, it shall be lawful and proper to do so, provided that all such operations shall in no wise impair the value of said premises, its buildings, appurtenances, and improvements as they now exist.

### **Form 16. — Lessor not to repair.**

It is agreed that the owner shall not be called upon or liable for any repairs whatsoever on said premises during the term; the house being now in perfect order.

### **Form 17. — Lessor to make repairs.**

And said lessor agrees to make all necessary repairs on the outside of the building.

### **Form 18. — — Another form.**

And said lessor covenants and agrees to put the buildings and fences on, around, and about the premises in a good condition, and so to maintain them for and during the said term.

### **Form 19. — Lessor to repair, lessee to contribute.**

The lessors may enter to view and make improvements, and expel the lessee if he shall fail to pay the rent as aforesaid or the percentage on repairs and improvements hereinafter mentioned, or make or suffer any strip or waste thereof. The lessee agrees that all repairs shall be made by him and at his expense except as hereinafter provided. The lessors may make such repairs and

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improvements as the lessee shall agree to with them, which repairs and improvements shall be at the expense of the lessors, and the lessee agrees to pay to the lessors *ten* per cent. per annum on the cost of such repairs and improvements agreed on as aforesaid, the said *ten* per cent. to be paid from the time said improvements and repairs are completed until the end of said term, and to be paid at the times reserved for payment of the rent as aforesaid.

### Form 20. — Lessee to repair, lessor to contribute.

I do hereby agree with said *R.* [lessee] that he may make repairs upon said premises during said term, and that I will pay towards such repairs the sum of *five hundred dollars* in the whole, he to retain that sum from the rent to grow due upon said lease from time to time as the same shall have been expended by him in such repairs. The lessee to exhibit bills as vouchers, satisfactory to the lessor.

### Form 21. Not to assign or underlet.

And said lessee will not, without obtaining upon each occasion the consent in writing of the lessor or of his heirs or assigns, assign this lease, nor underlet the whole or any part of said premises, [nor permit any other person or persons to occupy or improve the same].

### Form 22. Not to make alterations or additions.

Lessee agrees that no alterations or additions shall be made to the premises without the written consent of the lessor.

### Form 23. — Another form.

That neither they, nor others having their estate in the premises, shall or will make any alterations in, or additions in and to, the buildings on the said premises, or to the premises themselves without the consent of the lessors being first obtained in writing allowing thereof.

### Form 24. Alterations by lessee.

The demised premises are to be fitted at the sole cost of the said lessee, and thereafter to be used as a *bath establishment*



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under the limitations hereinafter set forth. The work of fitting up to be begun forthwith, and prosecuted without delay to completion, at such times and in such manner as shall not, by noise or otherwise, interfere with the use of the adjoining property as a *theatre*, and all changes and alterations to be made in a thorough and workmanlike manner.

### **Form 25. — Proviso as to material.**

Provided that said lessees erect, complete, and finish, in a good and substantial and workmanlike manner, and in strict conformity and keeping with the plans and specifications of the architect, *T. R.*, a new front to said stores at their own expense, the glass used in the same being of the best French plate double thick glass, similar to that used in the stores under the city hall.

### **Form 26. Abatement of rent and termination of lease.**

Provided always that if the premises or any part thereof, during the term, shall be destroyed or damaged by fire or other unavoidable casualty so that the same shall thereby be rendered unfit for use and habitation, then the rent hereinbefore reserved or a just and proportionate part thereof according to the nature and extent of the injuries sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said lessor, or these presents shall thereby be determined and ended at the election of the said lessor or his legal representatives.

### **Form 27. — Another form.**

Provided, however, that in case the premises or any part thereof shall during said term be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then and in such case the rent hereinbefore reserved, or a just and proportional part thereof, according to the nature and extent of the injury sustained, shall be suspended or abated until the premises shall have been put by the said lessor, or those having his estate in the premises, in proper condition for use and habitation; and provided, also, that in case the demised premises are so far injured by fire or other unavoidable casualty as to become unfit

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for use and occupation, then the lessor may elect whether to rebuild or repair the same or to terminate this lease; and in case this lease is terminated, for this cause, or for breach of any of the agreements herein contained, between the days whereon the rent herein reserved becomes due, then the lessee agrees to pay proportionate rent for the period of his actual occupation, and in case of such destruction or damage, or a like destruction or damage by any taking or appropriation by public authority for public uses, then the lessor, his heirs or assigns, may terminate this lease.

### **Form 28. — Shorter form.**

Provided that if the premises shall be destroyed by fire the payment of rent and the relation of landlord and tenant shall cease at the election of either party.

### **Form 29. Termination of lease on notice and payment.**

Said lessee doth agree to deliver up said premises, and all the buildings and repairs put upon the premises by him, on *three months'* notice, by said lessor paying him *two hundred and fifty dollars*.

### **Form 30. Termination by agreed notice.**

Either party, if dissatisfied, may terminate the lease by giving to the other party *six months'* previous notice, and fulfilling all the other requirements of the lease until the expiration of the said *six months*.

### **Form 31. Indemnity of rent; reletting.**

In case of a determination of the estate by reëntry for breach of condition, the lessee shall indemnify the lessor, or his heirs or assigns, for all loss and damage which he or they may, during the residue of the term above specified, suffer by reason of such determination, whether through decreased rents of said premises or otherwise.

### **Form 32. — Another form.**

And upon such reëntry the lessor may, at his discretion, relet the premises at the risk of the lessees, who shall remain for the

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residue of the term credited with such amounts only as shall be by the lessor actually realized; and the lessor shall be allowed *five* per cent. commission for collecting the same, and reasonable charges for repairs, etc.

### **Form 33. Purchase and sale of premises.**

And said lessors covenant and agree that within *five* years from the execution of these presents they will sell and convey to the said lessee or his assigns upon his or their request, all their (the lessors') present rights, titles, interests, and estates, and all the rights, titles, interests, and estates they may have, or can, by all reasonable acts and efforts at law or in equity obtain or acquire at the date or time of the conveyance in and to all the aforesaid leased premises, with all the privileges and appurtenances thereto belonging.

### **Form 34. — Buildings.**

It is agreed by and between the parties that at the expiration of this lease the buildings which have been heretofore erected by the lessee on the premises shall be appraised by three disinterested men, one to be chosen by the lessor, one by the lessee, and a third by said two appraisers thus chosen; and said *P.* [lessor] agrees to purchase said buildings of said *H.* [lessee] at the price so set by said appraisers.

### **Form 35. — Furniture.**

Said lessors or their legal representatives may terminate this lease at the expiration of *five* years from said *first* day of *October*, by giving to the said lessee *three months'* notice in writing of their intention to do so, and taking at the appraisal of three judicious, disinterested men, one to be chosen by each of said parties, and the other by the two that may be so selected, all the furniture of the lessee belonging to the establishment, and tendering him payment therefor accordingly.

### **Form 36. For the care and return of live stock.**

And the said lessee agrees to take good care of the stock, and to faithfully return said stock in quantity and quality to the lessor, or the value of the same in money, as the lessee may elect;

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said property, if retained, to be appraised by disinterested persons at the close of the contract. .

### **Form 37. For specified use of premises.**

And the said *E.* further covenants that he will not occupy, or in any manner suffer the buildings now on the premises, or which may hereafter be erected thereon, to be occupied for dwelling houses, or for any unlawful purpose whatever.

### **Form 38. Against unlawful or improper use of premises.**

Said lessee shall not make or suffer any unlawful, improper, or offensive use of the premises.

### **Form 39. — Another form.**

And no trade or occupation shall be carried on upon the said premises, or use made thereof, which shall be unlawful, improper, noisy, offensive, or contrary to any law of the Commonwealth, or ordinance for the time being in force of the *City of Boston*.

### **Form 40. Liability for nuisance.**

And also that he the said lessee and his representatives shall and will be responsible, and will pay all damages and charges to the city government or others, for any nuisance made or suffered on the premises during the term.

### **Form 41. Against wasting water.**

It being understood and agreed that the lessees, their heirs and assigns, are not to make any waste of the water, or suffer any to be made through their carelessness or negligence.

### **Form 42. To save lessor harmless from damage by water, ice, or snow.**

And also that they will save the said lessor and his representatives harmless from all loss or damage occasioned by the use, misuse, or abuse of the city [or town] water, or bursting of the pipes, as well as from any claim or damage arising from neglect in not removing snow and ice from the roof of the building or from the sidewalks bordering from the premises so leased.

## COVENANTS IN LEASES

### **Form 43. Lessor not to be responsible for personal property upon the premises.**

All merchandise, furniture, and property of any kind which may be on the premises during the continuance of this lease is to be at the sole risk and hazard of the lessee, and if the whole or any part thereof shall be destroyed or damaged by fire, water, or otherwise, or by the use or abuse of the city [or town] water, or by the leakage or bursting of water-pipes, or in any other way or manner, no part of said loss or damage is to be charged to or be borne by the lessors in any case whatever.

### **Form 44. Lessor to heat and light the premises.**

Said lessor agrees to deliver possession of the premises to the lessee upon completion of said building, and thereafter, during the term of this lease, reasonably to heat and light the demised premises.

### **Form 45. Arbitration.**

If at any time during the continuance of this lease any dispute should arise between the lessor and the lessee, their respective executors, administrators, or assigns, the question in dispute shall be submitted to arbitrators, one to be appointed by each of the persons in interest, and the third to be selected by the two thus appointed; their award shall be final.

### **Form 46. Extension of term unless notice given.**

And it is hereby mutually agreed that if, before the end of said term, neither of the parties shall give to the other *three months'* notice in writing of his intention to terminate this lease at the end of said term, said lease shall continue in force for another term of one year, and in the same manner from year to year, until one of said parties shall determine this lease by notice in writing, in the manner aforesaid, which notice shall terminate with the end of the year for which the premises are then held; and provided that either party may terminate this lease by notice in writing given *three months* before the termination of any one year.

## FORMS OF WRITTEN INSTRUMENTS

### **Form 47. Extension upon increased rent.**

Provided, however, that the said lessors or their legal representatives may terminate this lease at the expiration of *five* years from the *first* day of *October* next, by giving to the said lessee *three months'* notice in writing of their intention so to do, and taking, at the appraisal of three judicious, disinterested men, one to be chosen by each of said parties, and the other by the two that may be so selected, all the furniture of the lessee belonging to the establishment, and tendering him payment therefor accordingly.

If, however, upon receiving such notice, the said *H.* [lessee], his legal representatives or assigns, shall, within thirty days therefrom, give notice in writing to the said lessors or their legal representatives, that he or they will continue to hold the demised premises for the residue of said term, at the rate of *fifteen hundred dollars* per annum, he or they shall have the right so to hold them, notwithstanding such notice given them by the lessors or their legal representatives as aforesaid.

### **Form 48. — Another form.**

To hold for the term of *three* years from the date hereof, yielding and paying therefor the rent of *seven hundred dollars* a year; and at the election of said [lessee] for the further term of *two* years next after said term of *three* years, yielding and paying for said term of *two* years a rent of *seven hundred and fifty dollars* a year.

### **Form 49. Extension, short form.**

To hold for the term of *one* year at *seventy-five dollars*, with the privilege of continuing *five* years thereafter at *one hundred dollars* per year.

### **Form 50. Extension upon notice by lessee.**

To hold for the term of *one* year from *June 1, 1868*, the rent to be payable *June 1, 1869*, unless said *G.* [lessee] continue to occupy, and then *July 1*; said *G.* shall have this lease extended *two* years from *April 1, 1869*, upon notifying the lessor that he elects to retain the premises. It is understood that said *G.* shall notify the lessor of his wish to retain the premises, by *April 1, 1869*.

## CONDITIONS IN LEASES

### **Form 51. Renewal of sublease.**

The said lessors do promise to renew said indenture for such further term as their leasehold estate in the premises may be renewed or extended.

### **3. Conditions**

#### **Form 52. Condition as to forfeiture and reëntry.**

Provided always, and these presents are upon this condition, that in case of a breach of any of the covenants to be observed on the part of the lessee or of those claiming under him, or in case the estate hereby created shall be taken from him or them by process of law, by proceedings in bankruptcy or otherwise, the lessor or his heirs or assigns may, while the default or neglect continues, or at any time after such taking by process of law, and notwithstanding any license or waiver of any prior breach of condition, without any notice or demand enter upon the premises, and thereby determine the estate hereby created; and may thereupon expel and remove, forcibly if necessary, the lessee and those claiming under him and their effects, without being taken or deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant.

#### **Form 53. — Another form.**

Provided always, and these presents are upon this condition, that if the lessee or his representatives or assigns do or shall neglect or fail to perform and observe any or either covenant which on his or their part is to be performed, then and in either of said cases the said lessors, or those having their estate in the said premises lawfully, may immediately or at any time thereafter, and whilst such neglect or default continues, and without further notice or demand, enter into and upon the said premises, or any part thereof, in the name of the whole, repossess the same as of their former estate, and expel the said lessee and those claiming under him, and remove their effects (forcibly if necessary), without being taken or deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent, or preceding breach of covenant.

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### B. PRECEDENTS OF AGREEMENTS

#### **Form 54. Parol agreement for tenancy of a house, garden, furniture, linen, etc.**

Agreement made this *first* day of *March*, 1870, between [landlord], of, *etc.* (hereinafter called the landlord), of the one part, and [tenant], of, *etc.* (hereinafter called the tenant), of the other part: Whereby the landlord agrees to let, and the tenant agrees to take all that house situate and being No. 163, in *Colburn Crescent*, *Cambridge*, in the County of *Middlesex*, and Commonwealth of Massachusetts, with the stable, sheds, garden, and appurtenances thereto belonging, together with the use of the fixtures, furniture, plate, linen, utensils, and effects particularly mentioned in the schedule hereunder written; and also with the right to such produce of the garden as the tenant shall require for the use of himself and his household, and establishment; and also with such attendance as is hereinafter mentioned, for the term of *six calendar months* commencing from the *first* day of *May* next, at a rent of *two thousand dollars* for the said term, payable in advance, as to one moiety thereof, upon the execution of this agreement, and as to the remaining moiety thereof, immediately on the expiration of *three calendar months* of the said term. The landlord agrees to pay all rates, taxes, and assessments, except gas and water rates, and to execute at his own cost all repairs of the premises (except as hereinafter mentioned) which may be necessary during the term, upon being requested by the tenant so to do; and to leave or provide *two* servants who shall reside in the house and attend upon the tenant, and also a gardener, and to pay the wages of such indoor servants and gardener. The tenant agrees to pay the said rent in manner aforesaid, and to leave the premises, including the said fixtures, furniture, plate, linen, utensils, and effects, in as good state and condition in all respects as the same now are, reasonable wear and tear excepted, and to replace such of the same respectively as shall be broken, damaged, or missing, with other articles of the same pattern and equal value; and to permit the said indoor servants to reside in the house, and to provide them with proper and sufficient board; and to bear all expenses of



## AGREEMENTS

washing and mending all table or house linen which he shall use; and not to assign or underlet the premises or any part thereof without the previous consent of the landlord. Provided, that if there shall be any breach by the tenant of the conditions herein contained, the landlord may reënter upon any part of the premises in the name of the whole, and determine the tenancy without prejudice to his other remedies.

In witness whereof the said [*landlord and tenant*] have hereunto set their hands the day and year above written.

[*Schedule of property annexed.*]

### **Form 55. Agreement for a lease of a furnished house at separate rent for the house and the furniture.**

Agreement entered into the *first* day of *April*, 1880, between *A. B.*, of, *etc.* (hereinafter called the landlord), of the one part, and *C. D.*, of, *etc.* (hereinafter called the tenant), of the other part.

1. The landlord will by deed, before the *first* day of *July* next, grant, and the tenant will accept a lease of the dwelling-house No. *18 Union Square*, in the *City of Lynn*, with the yard and appurtenances thereto belonging, and the furniture specified in the schedule hereto, for a term of *four* years from the *first* day of *July*, 1880, at a yearly rent of *two thousand dollars* for the house and premises, except the furniture, and of *seven hundred dollars* for the furniture, the said rents to be payable by equal quarterly payments on the four usual quarter days, the first quarterly payment to be made on the *first* day of *October*, 1880, and the last to be made in advance one calendar month before the expiration of the said term. And at the further rent, in the event of and immediately upon the said term being determined by reëntering, under the proviso to be inserted in the said lease, of a proportionate part of the said several yearly rents for the fraction of the current quarter up to the day of such reëntering.

2. The lease shall contain the following covenants and provisions, namely: Covenants by the tenant — to pay the rents on the day and in the manner aforesaid: And to pay all taxes and assessments to which the premises may be liable during the term: And to keep the premises (including the

## FORMS OF WRITTEN INSTRUMENTS

furniture and fixtures) in good and tenantable repair and condition during the term, whether required to do so by notice or not, reasonable wear and tear excepted: And to permit the landlord, and his agents to enter to view the condition of the premises at all reasonable times, and to make good all defects there found, within *three calendar months* after notice from the landlord: And not to injure the furniture or fixtures, or to remove the same without the license in writing of the landlord: And to keep the premises (other than the furniture) insured in the sum of *ten thousand dollars*, and the furniture in the sum of *two thousand dollars*: And to produce the policies of insurance and receipts for premiums and other payments, when required by the landlord or his agents: And not to permit the premises to be used for any purpose except that of a private dwelling-house: And not to assign, underlet, or part with the possession of the premises, or any part thereof, without the previous license in writing of the landlord: And at the expiration or sooner determination of the said term to deliver up the said premises, together with all future erections and fixtures, in such good and tenantable repair and conditions as aforesaid: And a proviso for reëntering if any part of the said several rents shall be in arrear for thirty days, whether legally demanded or not; or if the tenant, his executors, administrators, or assigns or any of them shall be adjudicated bankrupt, or take proceedings for liquidation by arrangement or composition, or compound with his or their creditors; or if there shall be a breach of any of the tenant's covenants: And also the usual qualified covenant by the landlord for quiet enjoyment by the tenant.

3. The tenant will execute and deliver to the landlord a counterpart of the said lease.

4. The lease and counterpart shall be prepared by the landlord's solicitor, and all expenses attending the preparation and execution of this agreement and of the said lease and counterpart shall be paid by the landlord and tenant in equal proportions [*or by the tenant, or by the landlord.*]

5. This agreement shall not operate as a demise of the premises or give to the tenant any legal interest therein until the execution of the said lease.

## AGREEMENTS

In witness whereof, the said *A. B.* and *C. D.* have hereunto set their hands and seals the day and year first above written.

### **Form 56. Agreement for a building lease of premises for ninety-nine years.**

*(Adapted to the construction of a single dwelling-house.)*

Agreement made the *tenth* day of *August*, 1875, between [lessor], of, *etc.* (who and his heirs and assigns, unless the contrary appears, are hereinafter called the lessor), of the one part, and [lessee], of, *etc.*, (who and his executors, administrators, and assigns, unless the contrary appears, are hereinafter called the lessee), of the other part: Whereby it is agreed as follows:

1. When and so soon as the lessee shall have erected, built, and finished the dwelling-house and buildings mentioned in the fifth clause of this agreement, the lessor will grant to the lessee, a lease of all that piece or parcel of land, *etc.*, situate, *etc.*, and the messuage and buildings to be erected thereon with the appurtenances, which premises are delineated with the abuttal in the plan annexed to this agreement, from the *first* day of *October*, 1875, for the term of ninety-nine years, at the yearly rent of *fifteen hundred dollars* during the said term, payable quarterly, one the *first* day of *January*, the *first* day of *April*, the *first* day of *July*, and the *first* day of *October*, free and clear of and from every tax, charge, duty, assessment, or imposition whatsoever, to which the premises may be liable during said term; the first quarterly payment of the said yearly rent of *fifteen hundred dollars* to be made on the *first* day of *January*, 1876.

2. The lease and a counterpart thereof shall be prepared by the solicitor of the lessor, at the expense of the lessee; and shall contain covenants by the lessee to pay the said yearly rent of *fifteen hundred dollars* at the times and in manner aforesaid, and also to pay and discharge all the said taxes, charges, duties, assessments, and impositions, except as aforesaid; and also to keep the said dwelling-house and premises insured against fire in the sum of *twenty thousand dollars* in the joint names of the lessor and lessee, in some office to be approved by the lessor; and also to paint twice in oil colors, all the outside wood and iron work of the said premises once in every

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third year of the said term; and also to paint and paper the interior of the said premises once in every seventh year of the said term; and also not to set up any engine or machinery, nor exercise or carry on any sort of manufactory thereon; and not to carry on any noisome, dangerous, or offensive trade or business therein or thereupon, but to use the said premises only for the purpose of a private dwelling-house, and of the outbuildings and stable thereof; and also covenants by the lessee to repair and keep in repair the said premises and every part thereof; and to yield and deliver up the same at the end or sooner determination of the said term, in good and substantial repair, with all and every the fixtures, erections, and improvements which shall or may be made, fixed, or fastened, or set up in, upon, or about the premises, which shall or may come under the denomination of landlord's fixtures; and to pay and contribute a reasonable proportion of the expenses of making, repairing, amending, and cleansing all roads, pavements, party-wells, fences, sewers, drains, pipes, water-courses, and other conveniences which shall belong to or be used for the said premises in common with other adjoining or neighboring premises, such proportion to be paid to the lessor on demand, and to be recoverable by him as rent in arrear; and to permit the lessor with or without workmen, or other persons, to enter and view the said premises twice or oftener in every year, and to give notice of repair, and that the lessee will repair accordingly within three months after every such notice; and the usual qualified covenant on the part of the lessors for quiet enjoyment by the lessee; and the usual proviso for reëntry on non-payment of rent or on breach or non-performance of covenants; and the said lease shall also contain all other covenants, conditions, and provisions (if any), as are usually contained in leases of houses in that locality.

3. The lessee will accept such lease, on the terms and conditions aforesaid, and execute a counterpart thereof, when required, and pay the charges of and incidental to the preparation and execution of the same, as well as the charges of and incidental to these presents and a duplicate thereof.

4. Until such lease shall be granted, the lessee will pay the rents agreed to be thereby reserved and all taxes and assess-

## AGREEMENTS

ments as hereinbefore mentioned (except as aforesaid), and will as far as circumstances will admit observe and perform the covenants and conditions to be contained in the said lease as if the same had been actually granted, and the lessor shall have all such remedies for recovering rent and breach of covenant, as if the said lease had actually been granted.

5. The lessee will, on or before the *first* day of *October*, 1876, at his own costs and charges, pull down and remove the buildings now standing and being on the said piece of ground, and on the site thereof in a good, sound, substantial, and workmanlike manner, and with fit and proper materials of all kinds, to be approved by the architect of the lessor, and under the direction and inspection of such architect and to his satisfaction, erect, build, and complete, and in a workmanlike manner finish, one good and substantial brick messuage or tenement, fit for habitation, and in all things conformable and agreeable to the specification thereof hereunder written; and will lay out and expend thereon the sum of *twenty thousand dollars* and upwards; and also will bear, pay, and discharge the said architect's fees of *five* per cent. on the expenditure, for superintending and directing the same.

6. The lessor or his architect, or agent, may at all reasonable times during the continuance of this agreement enter upon the said premises to view the state and progress of the works and operations hereby agreed or authorized to be executed and carried out.

7. The lessee will carry on the said works and operations in such manner as to create as little disturbance or nuisance as possible to the owners or occupants of adjoining property.

8. The lessee shall be entitled to take for his own absolute use and benefit all materials of the said messuage and buildings so to be pulled down and removed as aforesaid.

9. The lessee shall not assign, or sublet, or otherwise part with the benefit of this agreement, except with the consent in writing of the lessor first had and obtained.

10. In case the lessee shall not erect, build, complete, and cover in, and in all respects finish and make fit for habitation such dwelling-house and buildings as aforesaid to the satisfaction of the lessor's architect or surveyor on or before the

## FORMS OF WRITTEN INSTRUMENTS

said *first* day of *October*, 1876 (in which respect time shall be of the essence of the contract), or if the said yearly rent of *fifteen hundred dollars* shall be in arrear for the space of thirty days after the same shall have become due (whether payment thereof shall have been formally or legally demanded or not), or in case of breach of any of the stipulations herein contained, or if the lessee shall not proceed with the works with proper diligence, then and in any such case it shall be lawful for the lessor, if he shall think fit, to reënter and take possession of the premises hereby agreed to be demised, and of all buildings, erections, plant, and materials which may be thereon, without making to the lessee any allowance or compensation in respect thereof.

11. This agreement shall not, nor shall anything herein contained or to be done in pursuance hereof, except the granting of a lease as aforesaid, operate as an actual or present demise of the premises or any part thereof or to create any leasehold interest therein or tenancy thereof: but the lessee shall only have a right to enter upon the premises for the purpose of performing this agreement. Any rents or yearly sums hereby agreed to be paid by the lessee, which shall be in arrear, shall be recoverable by the lessor as if the same were rent in arrear and the lessee were the tenant of the premises.

In witness whereof, the said [*lessor*] and the said [*lessee*] have hereunto set their hands and seals the day and year first above written.

## C. PRECEDENTS OF LEASES

### Form 57. Short form of lease.

This Indenture, made the *fifteenth* day of *June*, A. D. 1878, witnesseth, That I, *J. M.*, of *Boston*, in the County of *Suffolk* and Commonwealth of Massachusetts, hereby, lease, demise, and let unto *S. S. B.*, of said *Boston*, the house and land situated at the north-east corner of *D* and *B* streets in said *Boston*, said house being numbered 187 on said *B* Street, together with the easements and appurtenances belonging thereto.

To hold for the term of *six* years, from the *first* day of *July*, A. D. 1878, yielding and paying therefor the rent of *fifteen hundred dollars* per year.

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And said lessee promises to pay the said rent in equal *quarterly* payments upon the *first* days of *October, January, April, and July* in each year, the first payment to be made *October 1, 1878*, and to quit and deliver up the premises to the lessor, or his attorney, peaceably and quietly, at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are, or may be put into by the said lessor, and to pay the rent as above stated, during the term, and also the rent as above stated for such further time as the lessee may hold the same, and not make or suffer any waste thereof; nor lease, nor underlet, nor permit any other person or persons to occupy or improve the same, or make or suffer to be made any alteration therein, but with the consent of the lessor thereto in writing having been first obtained; and that the lessor may enter to view and make improvements, and to expel the lessee, if he shall fail to pay the rent as aforesaid, or make or suffer any strip or waste thereof.

And provided also, that in case the premises, or any part thereof during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinbefore reserved or a just and proportional part thereof, according to the nature and extent of the injuries sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said lessor, or these presents shall thereby be determined and ended at the election of the said lessor, or his legal representatives.

In witness whereof, the said parties have hereunto, and to another instrument of like tenor, set their hands and seals the day and year first above written.

### **Form 58. Lease of unfurnished house.**

THIS INDENTURE, made the *first* day of *September* in the year *nineteen hundred and seven*, between *P. H.*, hereinafter called the Lessor, and *E. P.*, hereinafter called the Lessee,

WITNESSETH, That the said Lessor does hereby grant, demise, and lease unto the said Lessee, [*description*] for the full



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term of *one year* beginning with and including the *first day of October, nineteen hundred and seven*.

The said Lessee hereby covenants and agrees (except as herein otherwise provided) to pay to the said Lessor, at the usual place of business of the said Lessor, *his* agents or attorneys, an annual rental for the said premises of *twelve hundred* dollars, in gold coin of the United States of America of the present standard of weight and fineness, in equal *monthly* payments of *one hundred* dollars each on the *first day* of each *month* during the said term, for the *month* ending with *the last day of the preceding calendar month*, and at the same rate for such further time as the said Lessee may hold the said premises or any part thereof, the first payment to be made on the *first day of November, 1907*; to pay, as soon as the same may become payable, all taxes, assessments, charges, and water-rates, of any kind, to which the said premises or any part thereof may become liable during the said term, or during such further time as the said Lessee may hold the said premises or any part thereof; to use the said premises solely for the following purposes:— *private residence*; to conform to all rules and regulations of the *Boston* Board of Fire Underwriters, and to all rules and regulations now or hereafter made by the said Lessor for the care of the Estate, of which the said premises form a part, and for the convenience of the tenants therein; to keep all and singular the said premises, including all landlord's fixtures therein or thereon, which are admitted now to be whole and in good order, in the same condition as the same are in at the beginning of the said term, or may be put in during the continuance thereof, and to deliver up to the said Lessor at the expiration of the said term the said premises, together with all future erections or additions on or to the same, in such repair and condition as aforesaid, reasonable use and wear thereof, and damage by accidental fire only excepted, vacant and unencumbered; to keep in good repair, with materials as good in quality as those now in use in the said premises, all glass, wires, pipes, valves, faucets, water-fixtures and plumbing, of any kind, now or hereafter in or on the said premises, all of which are now admitted to be whole and in good order and condition, unless the same shall have been damaged or



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broken by fire, and to leave all the above in perfect condition at the end of the within term; to allow the said Lessor or *his* agents to enter the said premises at all times to inspect the same, to make repairs, improvements or alterations on or to the same, or on or to other parts of the estate belonging to the said Lessor, if desired, to remove signs, placards, awnings or other things not placed or maintained as herein provided, or to show the said premises or building to others; to permit the said Lessor to place and maintain in or on the said premises, at *his* discretion, during the three months next preceding the expiration of the within term, a notice or notices, of customary size, for selling or letting the said premises; to save the said Lessor harmless from all loss, damage or liability caused by the use or misuse of bulkheads, of trap doors, of coal-holes or of covers, of water, of the plumbing, of heating apparatus, or of any other fixtures, at any time used in connection with, or forming part of, the said premises, or of the building containing the same, or by the bursting or leakage of any pipes, or by any nuisance made or suffered on the said premises, or by neglect of the said Lessee in not removing snow and ice from the said premises or any part thereof or from the sidewalks bordering on, or the roofs covering, the same, or on account of any accident occurring on or about the said premises or the adjoining sidewalks, however caused, or arising from any injury, loss or damage to any person or property in or on the said premises or the approaches thereto, or arising from any failure to keep and observe any or all of the covenants herein contained; to waive all rights of notice or demand hereunder, and to consider any notice from the said Lessor to the said Lessee relating to the said premises, or the occupancy thereof, as duly served if left at the said premises addressed to the said Lessee; not to assign this lease, nor underlet the whole or any part of said premises, nor make any additions or alterations thereto or thereon, nor place any sign, placard or awning therein or thereon, nor place any structure on the roof, nor allow any electric wires to enter the said premises, without the consent in writing of the said Lessor; not to damage, deface nor overload the said premises, nor permit any hole to be made in the stone, brick, iron, marble, plaster, stucco or wood work of the

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said premises, or the building containing the same, nor make nor permit any strip or waste of the said premises, nor use the said premises or any part thereof for any purposes other than those stated in this lease, nor for any purpose nor in any manner which may make void or voidable any policies of insurance on the said premises, or the building containing the same, nor which may render any increased or extra premium payable for any such insurance, nor which shall be unlawful, improper, noisy, offensive or contrary to any law, ordinance or by-law governing the said premises, and not to require of the said Lessor any improvements, alterations or repairs, nor the emptying of the vault or drain on the said premises, the same to be left empty at the end of the within term; that all property of any kind that may be on the said premises shall be at the sole risk of the said Lessee, and that no part of any loss or damage to such property, nor any liability to any person for the same, shall be borne or incurred by the said Lessor in any case whatever, whether such damage occurs through the negligence or carelessness of any servant or agent of the said Lessor, or otherwise; that no waiver of, nor assent to, by the said Lessor, any breach, by the said Lessee, of any of the covenants herein contained shall be deemed a waiver of any future or any other breach whatsoever.

It is mutually understood and agreed that the words "Lessor" and "Lessee" wherever used herein shall include heirs, legal representatives and assigns, and that the covenants of the Lessee are the joint and several obligations of each party signing as Lessee, and also that no specific words, phrases or clauses herein used shall be taken or construed to control, limit or cut down the scope or meaning of any general words, phrases or clauses used in connection therewith.

This lease is made on CONDITION that in case the said premises, or any part thereof, or the estate of which they form a part, or the whole or any part of the building of which they are a part, shall be taken by public authority for any public purposes, or shall be damaged or destroyed by fire or other unavoidable casualty, after the execution hereof, and before the expiration of the said term, then this lease may at the election of the said Lessor be terminated, and such election may be made

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in case of any such taking, notwithstanding the entire interest of the said Lessor may have been divested by such taking; provided that if this lease be not so terminated a just proportion of the rent hereinbefore reserved, according to the nature and extent of the injury sustained by the said premises, shall be suspended or abated until the said premises, or in case of such taking, what may remain thereof, shall have been put in as good condition as at the date of such damage or taking; and the said Lessee hereby assigns to the said Lessor any and all claims and demands for damages on account of any such taking.

This lease is made on CONDITION also that if the said Lessee shall neglect or fail to perform or observe any of the covenants herein contained, on *his* part to be performed or observed, or if the estate hereby created shall be taken on execution or by any process of law, or if the said Lessee shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of *his* property for the benefit of creditors, then and in any such cases (notwithstanding any license of any former breach of covenant or waiver of the benefit hereof or consent in a former instance) the said Lessor may lawfully, immediately, or at any time thereafter, without notice or demand, terminate this lease, enter into and upon the said premises, or any part thereof in the name of the whole, and, expelling said Lessee and removing *his* effects (forcibly if necessary) without being guilty of any manner of trespass and without prejudice to any rights or remedies which might otherwise be used for arrears of rent or preceding breach of covenant, repossess the same as of former estate; and thereupon the said Lessor may, at *his* discretion, relet the premises at the risk of the said Lessee, who shall remain responsible for the residue of said term for the full rent and taxes herein reserved whether the said premises remain vacant or not, and shall be credited only with such amounts as shall be actually realized by the said Lessor; in case of eviction of the said Lessee, or in case of the termination of this lease from any cause, the said Lessor may immediately recover of the said Lessee the pro-rata rent up to such time, irrespective of the periods here in prescribed for the payment of rent.

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IN WITNESS WHEREOF, the said parties hereunto set their hands and seals the day and year first above written.

IN CONSIDERATION of the making of the within written lease, I, J. Y., covenant with the Lessor named therein and *his* heirs, legal representatives and assigns, that if any default shall be made by the Lessee named therein, *his* heirs, legal representatives and assigns, in the performance of any of the within covenants on *his or their* part to be performed, I will pay the said rent or any arrears thereof remaining due, and all damages arising from the breach of any of the covenants, without notice of such default from the Lessor or other persons having *his* estate in the premises.

Witness *my* hand and seal this *first* day of *September*, 1907.

### Form 59. Lease of furnished dwelling-house with stable and garden; options to surrender and to renew.

THIS INDENTURE, made the *first* day of *October* in the year 1906, between A. B. of *Boston, Massachusetts* (hereinafter called the lessor, which word shall be construed as including and binding his heirs and assigns) of the one part, and C. D. of said *Boston* (hereinafter called the lessee, which word shall be construed as including and binding his heirs, executors, administrators and assigns) of the other part,

WITNESSETH, That in consideration of the rent and covenants herein reserved and contained on the part of the lessee to be paid, performed and observed, the lessor does hereby rent, demise and lease unto the said lessee the parcel of land [*description of land*] together with the house and stable thereon, being numbered 135 on said *High Street*; also the fixtures and furniture in the dwelling-house and stable, the tools and implements for use in the garden, lawn and stable, and the potted plants, as per schedule to be delivered by the Lessor herewith.

TO HOLD for the term of *one year* beginning with and including the first day of *November*, 1906. The lessee hereby covenants and agrees (except as herein otherwise provided) to pay the lessor an annual rental for the said premises of *twelve hundred* dollars (\$1200) in gold coin of the United States of the present

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standard of weight and fineness, in equal payments of *one hundred* dollars (\$100) on the first day of each month during the said term for the month ending with the last day of the previous month, the first payment to be made on the first day of *December* next, and at the same rate for such further time as the said lessee may hold the said premises or any part thereof; to pay as soon as the same may become payable all gas and water rates covering the gas and water used by the lessee; to use the said premises solely as a private residence; to keep all and singular the said premises, furniture, tools and fixtures in the same condition as they are in at the beginning of said term, or may be put in during the continuance thereof, and to deliver up to the said lessor at the expiration of the said term the said premises together with all future erections or additions on or to the same, in such repair and condition as aforesaid, reasonable use and wear thereof and damage by accidental fire only excepted, vacant and unencumbered; to keep in good repair with materials as good in quality as those now in use in the said premises, all glass, wires, pipes, valves, faucets, water fixtures and plumbing now or hereafter in said premises, unless the same shall have been damaged or broken by fire, and to leave all the above in good condition at the end of the term; to keep the garden and grounds hereby demised in good order and condition during the term and to have the various plants and shrubs now growing there properly cared for and looked after; to allow the said lessor or his agents to enter the said premises at all times to inspect the same, to make necessary repairs, on or to the same, or to show the said premises to others; to permit the lessor to place and maintain in or on the said premises at his discretion, during the three months next preceding the expiration of the within term, signs or notices in regard to selling or letting the said premises; to save the said lessor harmless of loss, damage or liability caused by the use or misuse of bulkheads, of water, of the plumbing, of heating apparatus, or of any other fixtures, or by the bursting or leakage of any pipes, or by the existence of snow and ice on or falling from any part of said premises, or on account of any accident occurring on or about the said premises, however caused, or arising from any injury to any

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person or property in or on the said premises, or arising from any failure to keep and observe any or all of the covenants herein contained; not to assign this lease, nor underlet the whole or any part of the said premises, nor make any additions or alterations thereon without the consent in writing of the lessor; not to permit any strip or waste of the said premises; not to use said premises or any part thereof for any purpose which will make void or voidable any policies of insurance on the said premises, or may render any increased or extra premium payable for any such insurance, or which shall be contrary to any law, ordinance, or by-law governing the said premises; that all property of any kind that may be on the said premises shall be at the sole risk of the lessee; that no waiver of, or assent to, by the said lessor, any breach, by the said lessee, of any of the covenants herein contained shall be deemed a waiver of any future or any other breach; that the lessee will pay the lessor the cost price of all coal and wood now on the premises which he may use during the term.

The lessee is to have the option of surrendering the premises on *June 15, 1907*, and of being relieved from further care and responsibility concerning the same on giving two weeks notice to the lessor of his intentions so to do, and on paying on said *June 15, 1907*, the balance of rent herein reserved for the remainder of the term. The lessee, but solely in case the above option is not exercised, is to have the further option of holding the premises under the same terms and conditions as herein set forth for a further period from *November 1, 1907*, to *July 1, 1908*, paying for the said period a rental of *seven hundred dollars (\$700)* in equal monthly payments of *one hundred dollars (\$100)*, beginning on *December 1, 1907*; provided that he shall give notice to the lessor of his desire to so extend this lease on or before *September 1, 1907*.

This lease is made on CONDITION that in case the said premises, or any part thereof, or the estate of which they form a part, or the whole or any part of the building of which they are a part, shall be taken by public authority for any public purposes, or shall be damaged or destroyed by fire or other unavoidable casualty, after the execution hereof, and before the expiration of the said term, then this lease may at the election

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of the said lessor be terminated, and such election may be made in case of any such taking, notwithstanding the entire interest of the said lessor may have been divested by such taking; provided that if this lease be not so terminated a just proportion of the rent hereinbefore reserved, according to the nature and extent of the injury sustained by the said premises, shall be suspended or abated until the said premises, or in case of such taking, what may remain thereof, shall have been put in as good condition as at the date of such damage or taking; and the said lessee hereby assigns to the said lessor any and all claims and demands for damages on account of any such taking.

This lease is made on CONDITION also that if the said lessee shall neglect or fail to perform or observe any of the covenants herein contained, on his part to be performed or observed, or if the estate hereby created shall be taken on execution or by any process of law, or if the said lessee shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of his property for the benefit of creditors, then and in any such cases (notwithstanding any license of any former breach of covenant or waiver of the benefit hereof or consent in a former instance) the said lessor may lawfully, immediately, or at any time thereafter, without notice or demand terminate this lease, enter into, and upon the said premises, or any part thereof in the name of the whole, and, expelling said lessee and removing his effects (forcibly if necessary) without being guilty of any manner of trespass and without prejudice to any rights or remedies which might otherwise be used for arrears of rent or preceding breach of covenant, repossess the same as of his former estate; and thereupon the said lessor may, at his discretion, relet the premises at the risk of the said lessee, who shall remain responsible for the residue of said term for the full rent and taxes herein reserved whether the said premises remain vacant or not, and shall be credited only with such amounts as shall be actually realized by the said lessor; in case of eviction of the said lessee, or in case of the termination of this lease from any cause, the said lessor may immediately recover of the said lessee the pro-rata rent up to such time, irrespective of the periods herein prescribed for the payment of rent.



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IN WITNESS WHEREOF, the said parties hereunto set their hands and seals the day and year first above written.

### Form 60. Lease of city building.

This indenture, made the *seventeenth* day of *November*, in the year *eighteen hundred and ninety-one*, between *G. A. G.* and *G. P. G.*, in their capacity as trustees under the will of *J. L. G.* (hereinafter called the lessors) of the one part, and *E. C. W.* (hereinafter called the lessee) of the other part witnesseth:

That in consideration of the rents and covenants herein reserved and contained on the part of the lessee and his heirs, executors, administrators, and assigns, to be paid, performed, and observed, the lessors do hereby demise and lease unto the lessee, the store *on the south-west corner of T. and LaG. Streets in Boston, Massachusetts*, in the building known as the *L. H.*, so called, with the cellar beneath said store.

To have and to hold the premises hereby demised unto the said lessee, and his executors, administrators, and assigns, for the term of *three years* from the *first of January, eighteen hundred and ninety-two*, yielding and paying therefor the yearly rent of *sixteen hundred dollars* in gold coin of the United States of the present standard of weight and fineness or its equivalent, during said term, by equal monthly payments of *one hundred and thirty-three dollars and thirty-four cents* on the first day of each month, for the month ending with said day, and also at the legal determination of this lease a proportionate part of the said rent for any part of the month then unexpired, and the lessee doth hereby, for himself and his heirs, executors, administrators, and assigns, both individually and as a firm, covenant with the lessors and their heirs and assigns that the lessee, his executors, administrators, or assigns, during the said term and for said further time as he or they or any other person or persons claiming under him shall hold the said premises or any part thereof, will pay unto the lessors or their heirs or assigns the said rent at the times and in the manner aforesaid and will keep all and singular the said premises and the fixtures thereon in such repair, order, and condition as the same are in at the commencement of said term, or may be put in during the con-



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tinuance thereof, damage by fire or other unavoidable casualties only excepted; and will not ask the lessors or their heirs to make any repairs whatever, and will pay all taxes and charges for light and water; and will save the lessors and their heirs and assigns harmless from all loss and damage or liabilities or expense that may be incurred by reason of any accident with the gas, water, or other pipes, or from the neglect or use of coal-holes or covers, or from not removing snow or ice from or that may be on the sidewalks of the building or occasioned by the use or escape of water upon the said premises, or by bursting of the pipes, or by any nuisance made or suffered on the premises; and will not assign or underlet the whole or any part of the said premises without first obtaining on each occasion the consent in writing of the lessors or their heirs or assigns; and will not permit any hole to be made or drilled in the stone or brick work of the said building, or any placard or sign to be placed upon the building except such and in such place and manner as shall have been first approved in writing by the lessors and their heirs or assigns; and will keep good with glass of the same kind and quality as that which may be injured or broken, all the glass now or hereafter in the premises, unless the same shall be broken by fire, acknowledging that the same is now whole and in good order; and will defray all the expenses of emptying and cleaning the drains and cesspools, and will leave the same empty; and at the expiration of the said term will remove their goods and effects, and those of all persons claiming under them, and will peaceably yield up to the lessors or their heirs or assigns the said premises, and all the erections or additions made on or upon the same, in good repair, order, and condition in all respects, damage by fire or other unavoidable casualty excepted; and that during the said term and such further time as aforesaid, the said premises are not to be overloaded, damaged, or defaced; and no trade or occupation shall be carried on upon the said premises, or use made thereof, which shall be unlawful, improper, noisy, or offensive, or contrary to any law of the State, or ordinance or by-law of *the city of Boston*, for the time being in force, or injurious to any person or property, and no act or thing shall be done upon the said premises which may make void or voidable any insurance of the said

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premises or building against fire or may render any increase or extra premium payable for any such insurance, and no addition or alteration to or upon the said premises shall be made without the consent of the lessors or their heirs or assigns; and all property of any kind that may be on the premises shall be at the sole risk of the lessee or those claiming through or under him, and the lessors or their heirs or assigns shall not be liable to the lessee or any other person for any injury, loss, or damage to any person or property on the premises; and that the lessors or their heirs or assigns or their agents may, during the said term, at seasonable times, enter to view the said premises, and may remove placards and signs not approved and affixed as herein provided, and may make repairs and alterations, if they should elect so to do, and may show the said premises and building to others, and at any time within the three months next before the expiration of said term may affix to any suitable part of the said premises a notice for letting or selling the said premises or building, and keep the same so fixed without hindrance or molestation.

Provided always that in case the said premises, or any part thereof, or the whole or any part of the building of which they are a part, shall be taken for any street or other public use, or shall be destroyed or damaged by fire or other unavoidable casualty, or by the action of the city or other authorities, after the execution hereof, and before the expiration of the said term, then this lease and the said term shall terminate at the election of the lessors or their heirs or assigns, and such election may be made in case of any of such taking, notwithstanding the entire interest of the lessors or their heirs or assigns may have been divested by such taking; and if they shall not so elect, then in case of any such taking or destruction of or damage to the demised premises, a just proportion of the rent hereinbefore reserved, according to the natural extent of the injury sustained by the demised premises, shall be suspended or abated until the demised premises or, in case of such taking, what may remain thereof, shall have been put in proper condition for use and occupation.

Provided also, and these presents are upon this condition, that if the lessee or his executors, administrators, or assigns

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do or shall neglect or fail to perform or observe any of the covenants contained in these presents, and on their part to be performed or observed, or if the estate hereby created shall be taken on execution, or by other process of law, or if the lessee or his executors, administrators, or assigns shall be declared bankrupt according to law, or if any assignment shall be made of their property for the benefit of the creditors, then and in any of the said cases (notwithstanding any license or any former breach of covenant or waiver of the benefit hereof, or consent in a former instance) the lessors or their heirs or assigns lawfully may, immediately or at any time thereafter, and without demand or notice, enter into and upon said premises or any part thereof in the name of the whole, and repossess the same as of their former estate, and expel the lessee and those claiming through and under him, and remove their effects (forcibly, if necessary), without being deemed guilty of any manner of trespass, and without prejudice of any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entering as aforesaid this lease shall determine; and the lessee covenants that in case of said termination, he will indemnify the lessors and their heirs against all loss of rent and other payments which they may incur by reason of such termination during the residue of the time first above specified for the duration of the said term.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

### Form 61. — Another form.

THIS INDENTURE, made the *first* day of *May* in the year *nineteen hundred and six*, between *L. I.*, hereinafter called the Lessor, and *F. H.*, hereinafter called the Lessee,

WITNESSETH, That the said Lessor does hereby grant, demise, and lease unto the said Lessee, [*description*] for the full term of *three years* beginning with and including the *first* day of *July, nineteen hundred and six*.

The said Lessee hereby covenants and agrees (except as herein otherwise provided) to pay to the said Lessor, at the usual place of business of the said Lessor, *his* agents or attorneys,

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an annual rental for the said premises of *six hundred* dollars, in gold coin of the United States of America of the present standard of weight and fineness, in equal *monthly* payments of *fifty* dollars each on the *first* day of each *month* during the said term, for the *month* ending with *the last day of the preceding calendar month*, and at the same rate for such further time as the said Lessee may hold the said premises or any part thereof, the first payment to be made on the *first* day of *August, 1906*; to pay, as soon as the same may become payable, all taxes, assessments, charges, and water-rates, of any kind, as well as any increase in the premium of insurance caused by the use of the said premises by the said Lessee, to which the said premises or any part thereof may become liable during the said term, or during such further time as the said Lessee may hold the said premises or any part thereof; to use the said premises solely for the following purposes:— *stock brokerage business*; to conform to all rules and regulations of the *Boston Board of Fire Underwriters*, and to all rules and regulations now or hereafter made by the said Lessor for the care of the Estate, of which the said premises form a part, and for the convenience of the tenants therein; to keep all and singular the said premises, including all landlord's fixtures therein or thereon, which are admitted now to be whole and in good order, in the same condition as the same are in at the beginning of the said term, or may be put in during the continuance thereof, and to deliver up to the said Lessor at the expiration of the said term the said premises, together with all future erections or additions on or to the same, in such repair and condition as aforesaid, reasonable use and wear thereof, and damage by accidental fire only excepted, vacant and unencumbered; to keep all machinery, elevators, fixtures, apparatus, shaftways, and the like, at any time used in connection with, or forming part of, the said premises, as well as all approaches thereto, all of which are now admitted to be whole and in good order and condition, thoroughly inspected and provided with all safety guards and appliances required by law; to keep in good repair, with materials as good in quality as those now in use in the said premises, all glass, wires, pipes, valves, faucets, water-fixtures and plumbing, of any kind, now or hereafter

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in or on the said premises, all of which are now admitted to be whole and in good order and condition, unless the same shall have been damaged or broken by fire, and to leave all the above in perfect condition at the end of the within term; to allow the said Lessor or *his* agents to enter the said premises at all times to inspect the same, to make repairs, improvements or alterations on or to the same, or on or to other parts of the estate belonging to the said Lessor, if desired, or to show the said premises or building to others; to permit the said Lessor to place and maintain in or on the said premises, at *his* discretion, during the three months next preceding the expiration of the within term, a notice or notices, of customary size, for selling or letting the said premises, or to remove signs, placards, awnings or other things not placed or maintained as herein provided, and to transmit power and heat through the said premises, at the discretion of the said Lessor, at all times; to save the said Lessor harmless from all loss, damage or liability caused by the use or misuse of bulkheads, of trap doors, of coal-holes or of covers, of water, of the plumbing, of steam fixtures, of heating apparatus, of wiring, or of any other fixtures, at any time used in connection with, or forming part of, the said premises, or of the building containing the same, or by the bursting or leakage of any pipes, or by any nuisance made or suffered on the said premises, or by neglect of the said Lessee in not removing snow and ice from the said premises or any part thereof or from the sidewalks bordering on, or the roofs covering, the same, or on account of any accident occurring on or about the said premises or the adjoining sidewalks, however caused, or arising from any injury, loss or damage to any person or property in or on the said premises or the approaches thereto, or arising from any failure to keep and observe any or all of the covenants herein contained; to waive all rights of notice or demand hereunder, and to consider any notice from the said Lessor to the said Lessee relating to the said premises, or the occupancy thereof, as duly served if left at the said premises addressed to the said Lessee; not to assign this lease, nor underlet the whole or any part of said premises, nor make any additions or alterations thereto or thereon, not place any sign, placard or awning therein or there-

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on, nor obstruct any windows, skylights or other lights, not place any structure on the roof, nor allow any electric wires to enter the said premises, without the consent in writing of the said Lessor; not to damage, deface nor overload the said premises, nor permit any hole to be made in the stone, brick, iron, marble, plaster, stucco or wood work of the said premises, or the building containing the same, nor make nor permit any strip or waste of the said premises, nor use the said premises or any part thereof for any purposes other than those stated in this lease, nor for any purpose nor in any manner which may make void or voidable any policies of insurance on the said premises, or the building containing the same, nor which shall be unlawful, improper, noisy, offensive or contrary to any law, ordinance or by-law governing the said premises, and not to require of the said Lessor any improvements, alterations or repairs, nor the emptying of the vault or drain on the said premises, the same to be left empty at the end of the within term; that all property of any kind that may be on the said premises shall be at the sole risk of the said Lessee, and that no part of any loss or damage to such property, nor any liability to any person for the same shall be borne or incurred by the said Lessor in any case whatever, whether such damage occurs through the negligence or carelessness of any servant or agent of the said Lessor, or otherwise; that, in case the said Lessor is furnishing elevator service, steam heat, or electric lighting, by agreement under this lease, the said Lessor shall in no way be held liable for any loss or damage caused by interruption or cessation of such elevator service, steam heat, or electric lighting, from any cause; that no waiver of, nor assent to, by the said Lessor, any breach, by the said Lessee, of any of the covenants herein contained shall be deemed a waiver of any future or any other breach whatsoever.

It is mutually understood and agreed that the words "Lessor" and "Lessee" wherever used herein shall include heirs, legal representatives and assigns, and that the covenants of the Lessee are the joint and several obligations of each party signing as Lessee, and also that no specific words, phrases or clauses herein used shall be taken or construed to control,

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limit or cut down the scope or meaning of any general words, phrases or clauses used in connection therewith.

This lease is made on CONDITION that in case the said premises, or any part thereof, or the estate of which they form a part, or the whole or any part of the building of which they are a part, shall be taken by public authority for any public purposes, or shall be damaged or destroyed by fire or other unavoidable casualty, after the execution hereof, and before the expiration of the said term, then this lease may at the election of the said Lessor be terminated, and such election may be made in case of any such taking, notwithstanding the entire interest of the said Lessor may have been divested by such taking; provided that if this lease be not so terminated a just proportion of the rent hereinbefore reserved, according to the nature and extent of the injury sustained by the said premises, shall be suspended or abated until the said premises, or in case of such taking, what may remain thereof, shall have been put in as good condition as at the date of such damage or taking; and the said Lessee hereby assign to the said Lessor any and all claims and demands for damages on account of any such taking.

This lease is made on CONDITION also that if the said Lessee shall neglect or fail to perform or observe any of the covenants herein contained, on *his* part to be performed or observed, or the estate hereby created shall be taken on execution of by any process of law, or if the said Lessee shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of *his* property for the benefit of creditors, then and in any such cases (notwithstanding any license of any former breach of covenant or waiver of the benefit hereof or consent in a former instance) the said Lessor may lawfully, immediately, or at any time thereafter, without notice or demand, terminate this lease, enter into, and upon the said premises, or any part thereof in the name of the whole, and, expelling said Lessee and removing *his* effects (forcibly if necessary) without being guilty of any manner of trespass and without prejudice to any rights or remedies which might otherwise be used for arrears of rent or preceding breach of covenant, repossess the same as of *his* former estate; and thereupon the said Lessor



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may, at *his* discretion, relet the premises at the risk of the said Lessee, who shall remain responsible for the residue of said term for the full rent and taxes herein reserved whether the said premises remain vacant or not, and shall be credited only with such amounts as shall be actually realized by the said Lessor; in case of eviction of the said Lessee, or in case of the termination of his lease from any cause, the said Lessor may immediately recover of the said Lessee the pro-rata rent up to such time, irrespective of the periods herein prescribed for the payment of rent.

IN WITNESS WHEREOF, the said parties hereunto set their hands and seals the day and year first above written.

IN CONSIDERATION of the making of the within written lease I, *J. M. I.*, covenant with the Lessor named therein and *his* heirs, legal representatives and assigns, that if any default shall be made by the Lessee named therein, *his* heirs, legal representatives and assigns, in the performance of any of the within covenants on *his or their* part to be performed, *I* will pay the said rent or any arrears thereof remaining due, and all damages arising from the breach of any of the covenants, without notice of such default from the Lessor or other persons having *his* estate in the premises.

Witness *my* hand and seal this *first* day of *May*, 1906.

### Form 62. Lease of offices in city building.

This indenture, made the *sixteenth* day of *August*, in the year *eighteen hundred and ninety-four*, between *A. B.*, of *X.* (hereinafter called the lessor, which expression shall include his heirs and assigns where the context so admits), of the one part, and *C. D.*, of *Y.* (hereinafter called the lessee, which expression shall include his executors, administrators, and assigns, where the context so admits), of the other part, witnesseth, that in consideration of the rent and covenants herein reserved and contained on the part of the lessee to be paid, performed, and observed, the lessor doth hereby demise and lease unto the lessee the room numbered *seven hundred thirty-two*, on the *seventh* story of the building known as *Washington Building*, situate on *Congress Street*, in the *City of Boston*, in the County of *Suffolk*



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and said Commonwealth; but no right to light or air through any window opening upon the estate known as "*T. estate*," is hereby leased. To have and to hold the premises hereby demised unto the lessee for the term of *one year*, beginning with the *first* day of *September*, in the year *eighteen hundred and ninety-four*, yielding and paying therefor the yearly rent of *four hundred* dollars during the said term, by equal *monthly* payments of *thirty-three*  $\frac{1}{10}$  dollars on the *first* day of *every month*, for the *month* ending with the day previous, the first payment to be made on the *first* day of *October* next, and also at the legal determination of this lease a proportionate part of the said rent for any part of a *month* then unexpired. And the lessee doth hereby covenant with the lessor that the lessee, during the said term and for such further time as he or any other person or persons claiming under him shall hold the said premises or any part thereof, will pay unto the lessor the said rent at the times and in the manner aforesaid, no charge being made by the lessor for any steam heat furnished, or for use of elevators, and will keep all and singular the said premises in such repair, order, and condition as the same are in at the commencement of the said term, or may be put in during the continuance thereof, damage by fire or other unavoidable casualty only excepted; and will make good any damage caused by his or their misuse of the water or steam, or the pipes or fixtures therefor, and will conform to all rules and regulations now or hereafter established by said lessor for the general comfort and convenience of the tenants in said building; and will use and occupy said room only for his business as a *lawyer*, and will not assign or underlet the whole or any part of the said premises without first obtaining on each occasion the consent in writing of the lessor, and will not permit any hole to be drilled or made in the stone or brick work of the said building, or any placard or sign to be placed upon the building, except such and in such place and manner as shall have been first approved in writing by the lessor, and will keep good with glass of the same kind and quality as that which may be injured or broken, all the glass now or hereafter in the premises, unless the same shall be broken by fire, acknowledging that the premises are now in good order and the glass whole; and at the expiration of the

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said term will remove his goods and effects, and those of all persons claiming under him, and will peaceably yield up to the lessor the said premises, and all erections and additions made to or upon the same, in good repair, order, and condition in all respects, damage by fire or other unavoidable casualty excepted; and will hold the lessor harmless and indemnified against any injury, loss, or damage to any person or property in said building ; and that during the said term, and such further time as aforesaid, the said premises shall not be overloaded, damaged, or defaced; and no trade or occupation shall be carried on upon the said premises, or use made thereof which shall be unlawful, improper, noisy, or offensive, or contrary to any law of the Commonwealth or ordinance or by-law of the *City of Boston* for the time being in force, or injurious to any person or property; and no act or thing shall be done upon the said premises which may make void or voidable any insurance of the said premises or building against fire, or may render any increased or extra premium payable for any such insurance; and no addition or alteration to or upon the said premises shall be made without the consent in writing of the lessor; and all property of any kind that may be on the premises shall be at the sole risk of the lessee or those claiming through or under him, and that the lessor or its agents may, during the said term, at seasonable times, enter to view the said premises, and may remove placards and signs not approved and affixed as herein provided, and may make repairs and alterations if it should elect so to do; and that any notice from the lessor to the lessee relating to the demised premises, or the occupancy thereof, shall be deemed duly served if left at the demised premises addressed to the lessee.

Provided always that in case the said premises, or any part thereof, or the whole or any part of the building of which they are a part, shall be taken for any street or other public use, or shall be destroyed or damaged by fire or other unavoidable casualty, or by the action of the city or other authorities, after the execution hereof and before the expiration of the said term, then this lease and the said term shall terminate at the election of the lessor, and such election may be made in case of any such taking, notwithstanding the entire interest of the lessor may

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have been divested by such taking; and if he shall not so elect, then in case of any such taking or destruction of or damage to the demised premises, a just proportion of the rent hereinbefore reserved, according to the nature and extent of the injury sustained by the demised premises, shall be suspended or abated until the demised premises, or, in case of such taking, what may remain thereof, shall have been put in proper condition for use and occupation.

Provided also, and these presents are upon this condition, that if the lessee shall neglect or fail to perform or observe any of the covenants contained in these presents, and on his part to be performed or observed, or if the estate hereby created shall be taken on execution, or by other process of law, or if the lessee shall be declared bankrupt according to law, or if any assignment shall be made of his property for the benefit of creditors, then and in any of the said cases (notwithstanding any license of any former breach of covenant or waiver of the benefit hereof or consent in a former instance) the lessor lawfully may immediately, or at any time thereafter, and without demand or notice, enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of his former estate, and expel the lessee and those claiming through or under him and remove his or their effects (forcibly, if necessary), without being deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine; and the lessee covenants that in case of such termination he will indemnify the lessor against all loss of rent and other payments which he may incur by reason of such termination during the residue of the time first above specified for the duration of the said term.

In witness whereof the said *A. B.* and the lessee have hereto set their hands and seals the day and year first above written.

### **Form 63. — Conditions and building regulations.**

The above letting is upon the following conditions, all and every one of which the said lessee covenants and agrees to and with the said lessor, to keep and perform; it being understood

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and agreed that the words "lessor" and "lessee," whenever herein used, include and bind or benefit the successor and successors, or the heirs, executors, administrators and assigns of the lessor and lessee respectively, as if each time fully expressed.

1st. The lessee shall pay to the lessor the specified rent at the times and in the manner above provided; and in case of the non-payment of the rent at the said times and place, or in case the leased premises shall be deserted or vacated, the lessor may enter the same as the agent of the lessee, either by force or otherwise, without being liable to any prosecution therefor, and relet the premises as the agent of the lessee and receive the rent therefor; and the lessee hereby expressly agree to give formal written notice to the lessor, on or before the *fifteenth* day of *January, 1900*, of its wish as to continuing the tenancy.

2nd. The premises or any part thereof shall not be assigned, let or underlet, or used or permitted to be used for any purpose other than above mentioned, without the written consent of the lessor, first endorsed hereon, and if so assigned, let or underlet, used or permitted to be used without such written consent, the lessor may re-enter and relet the premises, this lease by such unauthorized act becoming void if the lessor shall so determine and elect.

3rd. The lessee shall quit and surrender the premises at the end of the term in as good condition as the reasonable use thereof will permit, and shall not make any alterations, additions or improvements in the premises, without the written consent of the lessor, and all alterations, additions or improvements which may be made by either of the parties hereto upon the premises, except movable office furniture put in at the expense of the lessee, shall be the property of the lessor, and shall remain upon and be surrendered with the premises as a part thereof at the termination of this lease, without disturbance, molestation or injury.

4th. The rules and regulations in regard to the said building, printed on the back of this lease, constitute a part of this lease, and shall, so far as the said party of the second part is concerned, be in all respects observed and performed by it and by its clerks, servants and agents during the term.

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5th. If during term of this lease, the building or premises are destroyed by fire or the elements, or partially destroyed so as to render the premises demised wholly unfit for occupancy, and if they shall be so badly injured that they cannot be repaired with reasonable diligence, within sixty days from the happening of such injury, then this lease shall cease and become null and void from the date of such damage or destruction, and the lessee shall immediately surrender the premises and all interest therein to the lessor and the lessee shall pay rent within this term only to the time of such surrender; and in case of destruction or partial destruction as above mentioned, the lessor may re-enter and re-possess the premises discharged of this lease, and may remove all parties therefrom; and if the premises shall be reparable as aforesaid within sixty days from the happening of said injury then the rent shall not run or accrue after said injury, or while the process of repairs is going on, and the lessor shall repair the same with all reasonable speed, and then the rent shall recommence immediately after the said repairs shall be completed. But if the premises shall be so slightly injured by fire or the elements as not to be rendered unfit for occupancy, then the lessor agrees that the same shall be repaired with reasonable promptitude, and in that case the rent accrued or accruing shall not cease or determine.

6th. The lessor shall not be liable for any damage to any property at any time in said premises or building, from the *Croton* or other water, rain or snow, which may leak into, issue, or flow from any part of said building, of which the premises hereby leased are part, or from the pipes or plumbing works of the same, or from any other place or quarter.

7th. The lessee shall give to the lessor or his agent prompt written notice of any accident to or defects in the water pipes, gas pipes or warming apparatus to be remedied by the lessor with due diligence.

8th. In case of violation of the foregoing covenants, agreements and conditions or of the rules and regulations now or hereafter to be reasonably established or either of them, by the lessee, this lease shall thenceforth (at the option of the lessor) become null and void, and the lessor may re-enter without notice or demand; and rent in such case shall become due, be appor-

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tioned and paid on and up to the day of such entry, and the lessee hereby expressly waives all right to any notice to quit possession, or of intention to re-enter under the statute, anything in this lease to the contrary notwithstanding; and the lessee shall be liable for all loss or damage resulting from such violation as aforesaid.

And the lessor on its part agrees it will have in operation in said building six passenger elevators, to be run during the ordinary business hours of every day, except Sundays and public holidays. All ordinary cleaning, repairing and restoring of the elevators shall be effected during the night; but in case it becomes necessary at any time from accident or for extraordinary repairs or improvements the lessor may suspend the operation during business hours of any one of them, or more than one in case of special and overpowering necessity.

The lessor will also keep in operation in said building a steam warming apparatus for the use of the tenants, from the fifteenth day of October in each year till the fifteenth of May following, accident or necessity excepted; and will furnish light between the hours of 8 A.M. and 6 P.M. and will cause the building to be cleaned and generally cared for by the janitor, subject to the rules and regulations printed hereon.

### Rules and Regulations for the *Washington* Building

1. The sidewalk, entry passages, elevators and stairways shall not be obstructed by either of the tenants, or used by them for any other purpose than for ingress and egress from and to their respective apartments.

2. The floors, skylights and windows that reflect or admit light into the passageways or into any place in said building shall not be covered or obstructed by either of the tenants. The water-closets and other city water apparatus shall not be used for any purpose other than those for which they were constructed, and no sweepings, rubbish, rags, ashes, or other substances, shall be thrown therein. Any damage resulting to them from misuse shall be borne by the tenant who shall cause it.

3. No sign, advertisement or notice shall be inscribed, painted or affixed on any part of the outside or inside of said

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building, unless of such color, size and style, and in such places upon or in said buildings as shall be first designated by the lessor and endorsed hereon.

4. No tenant shall do, or permit anything to be done in said premises, or bring or keep anything therein which will in any way increase the rate of fire insurance on said building, or on the property kept therein, or obstruct or interfere with the rights of other tenants, or in any other way injure or annoy them or conflict with the laws relating to fires, or with the regulations of the Fire Department, or with any insurance policy upon said building or any part thereof, or conflict with any of the rules and ordinances of the Board of Health.

5. The lessor shall in all cases retain the power to prescribe the weight and proper position of iron safes, and all damage done to the building by taking in or putting out a safe, or during the time it is in or on the premises, shall be made good and paid by the tenant who shall cause it.

6. Each tenant shall keep the premises leased by him in a good state of preservation and cleanliness.

7. No tenant shall employ any person or persons for the purpose of cleaning or taking charge of said premises, or lighting fires, storing or moving coal, or wood or ashes.

8. The lessors shall have the right to enter any premises at reasonable hours in the day to examine the same, or to make such repairs and alterations as he shall deem necessary for the safety and preservation of the said building, and also to exhibit the said premises to be let, and to put upon them the usual notice "To be Let," which said notice shall not be removed by any tenant during the three months previous to the expiration of the lease of the premises.

9. Tenants, their clerks or servants, shall not make or permit any improper noise in the building, smoke tobacco in the elevators or interfere in any way with other tenants or those having business with them.

10. Nothing shall be thrown by the tenants, their clerks or servants, out of the windows or doors, or down the passages or skylights of the building.

11. No animals shall be kept in or about the premises.

12. The whole building will be heated by the most approved



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steam apparatus, and many offices are provided with fireplaces, which may be used, if preferred to steam heat, by tenants.

13. The rent of an office will include Janitor's service, steam heat, and light.

14. If tenants desire shades, they will be put in by the lessor at cost.

15. If tenants desire telegraphic or telephonic connections, the lessor will direct the electricians as to where and how the wires are to be introduced, and without such direction no boring or cutting for wires will be permitted.

16. Directory Boards, in conspicuous places on each story, with the names of tenants, will be provided by the lessor.

17. The lessor shall have the right to prevent peddlers and bootblacks from entering the building, and no canvassing shall be allowed, except by written permit signed by an officer of the Company, which permit shall be granted only on the written request of a tenant.

18. The lessor reserves the right to make such other and further reasonable rules and regulations as in its judgment may from time to time be needful for the safety, care and cleanliness of the premises, and for the preservation of good order therein; and especially such rules and regulations as shall appertain to coal-boat-men.

### **Form 64. Lease of flat or chambers.**

This indenture, made the *tenth* day of *September*, A. D. 1870, between A. B., of *Dedham* in the County of *Norfolk*, and Commonwealth of Massachusetts, hereinafter called the lessor, of the one part, and C. D., of *Cambridge* in the County of *Middlesex* in said Commonwealth, hereinafter called the lessee, of the other part; witnesseth that the lessor hereby demises unto the lessee all that suite of apartments, consisting of *seven* rooms, known or intended to be known as the *tenth* suite of apartments, on the *sixth* floor of the building numbered 362 on *K* Street, in the city of *Lynn*, in the County of *Essex*; to hold unto the lessee for the term of *three* years, from the *first* day of *October*, A. D. 1870, yielding the yearly rent of *eight hundred dollars*, and so in proportion for any period less than one year, by equal quarterly payments on the *first* days of *January, April, July, and October*



## LEASES

of every year, the first of such payments to be made on the *first* day of *January*, 1871.

The lessee hereby covenants with the lessor that he, the lessee, will pay the said rent at the times and in the manner aforesaid, and will pay the *Lynn* Gas Company all charges for gas consumed on the premises, according to the metre placed or to be placed therein by the said Gas Company; and also will not use or permit the premises to be used for any illegal or improper purpose; nor exhibit any placard on any part thereof; nor hang, nor allow to be hung, any clothes or other articles on the outside of the premises; nor make nor permit to be made any disturbance, noise, or annoyance whatsoever, detrimental to the premises, or to the comfort of the other inhabitants of the said building; nor do, nor permit to be done, any act or thing which may be to the annoyance, damage, or disturbance of the lessor or his tenants, or the occupiers of any adjoining premises; nor convert the premises, or any part thereof, into nor use the same as a shop or warehouse, or suffer any trade to be carried on therein, but will use the same as a private residence only; and will not make any unlawful, improper or offensive use of the premises; and will not waste, nor permit to be wasted, any water on the premises; and will not allow any person or persons or children under his control to loiter or play in the passages, landings, or stairs of the said building, nor soil the same by the carrying of coal or other articles, and shall not use the same in any way except for the purposes of ingress or egress; and will not assign or underlet the premises, or any part thereof, without the consent in writing of the lessor, such consent not to be unreasonably withheld; and will keep the interior of the premises, and also the doors and windows thereof, and the fixtures therein, and all interior walls, pipes, and other appurtenances, in good, substantial, and tenantable repair, and in clean condition (damage by fire excepted); and also will permit the lessor, or his agents, and his or their respective architects, agents, surveyors, and workmen, at all reasonable hours, to enter into the premises to view the condition thereof, and to give or leave notice in writing upon the premises, for the lessee, of all defects and wants of repair there found; and also will, within *three* calendar months after every

## FORMS OF WRITTEN INSTRUMENTS

such notice, well and sufficiently repair and make good such defects and wants of repair, whereof notice shall have been so given or left; and also will permit the lessor and his agents or workmen to do all such repairs as the lessor may be liable to do upon the premises, or in or upon premises adjoining the same; and also will not during the said term cut or weaken any of the principal timbers or walls of the premises, or any part thereof, or make or permit to be made any addition to the premises, or any alteration in the architectural decoration thereof, without the license in writing of the lessor; and will at the end of the said term peaceably and quietly deliver up possession of the premises unto the lessor in good state and condition (damage by fire or other unavoidable casualty excepted), together with all improvements and additions thereto.

The lessor hereby covenants with the lessee that the lessee, performing and observing all the covenants by the lessee herein contained, may quietly hold and enjoy the premises during the said term without any interruption by the lessor, or any person claiming through him; and further, that he, the lessor, will pay all rates and taxes that now are, or that hereafter may be, imposed upon the premises, including the water rate but excluding the gas rate, and that he will keep the exterior of the premises in good and substantial repair.

Provided always that, on any breach of any of the covenants by the lessee herein contained, the lessor may re-enter upon the premises, and immediately thereupon the said term shall absolutely determine. Provided also that if the premises, or any part thereof, shall at any time during the said term be destroyed or rendered uninhabitable by fire or other unavoidable casualty (except through the wilful neglect of the lessee), then and in such case the payment of the rent hereby reserved, or a proportionate part thereof, according to the extent of the damage incurred, shall be suspended until the premises shall have been reinstated and again rendered fit for habitation. Provided lastly, that the term "lessor" shall include the heirs and assigns of the lessor, and the term "lessee" shall include the executors, administrators, and assigns of the lessee, throughout these presents, so far as the nature of the case will admit,

## ASSIGNMENT OF LEASES

and unless the context may require a different construction. In witness whereof, the said [*lessor*] and the said [*lessee*] have hereunto set their hands and seals the day and year first above written.

### D. EXTENSIONS OF LEASES

#### Form 65. Extension to be endorsed upon lease.

We the undersigned, parties to the within lease, hereby mutually covenant and agree that the term of said lease is hereby extended for the period of *six* years from the expiration thereof, subject to all the covenants, conditions, provisos, and agreements therein contained. Witness our hands and seals this *tenth* day of *June*, 1890.

### E. ASSIGNMENTS OF LEASES

#### Form 66. Assignment to be endorsed on lease.

*Boston, Feb. 4, 1876.*

In consideration of *eight hundred dollars* and other good and valuable considerations to me paid by *P.*, of said *Boston*, the receipt whereof is hereby acknowledged, I do hereby sell, assign, transfer, and set over to the said *P.*, his heirs and assigns, all my right, title, and interest in and to the within written instrument. Witness my hand and seal the day and year above written.

*J. S. [lessee].*

#### Form 67. — Short form.

I, *A. B.*, the lessee named in the within lease, hereby assign, transfer, and set over to *C. D.* the within lease, the premises thereby demised, and all my right, title, and interest therein and thereunder.

#### Form 68. Agreement by assignee to assume covenants of lease.

In consideration of the foregoing assignment to us made [*or, if on separate paper, describe the assignment*], we hereby covenant and agree to and with the said *F.* [*lessor*] herein named, that we will punctually pay the rent and charges for steam heat in said lease named to be paid, and that we will keep, fulfil, and per-

## FORMS OF WRITTEN INSTRUMENTS

form all the covenants and agreements in said lease named as to be kept, fulfilled, and performed by the lessee or his assigns, and that we will use and occupy said premises for *the millinery business*; but not in any manner to affect the premiums of insurance upon the building.

In witness whereof, we have hereunto set our hands and seals this *fourth* day of *February*, 1876.

### F. BOND OF INDEMNITY

**Form 69. From lessee to sublessee covering cost of improvements.**

Whereas, the said *P.* has heretofore leased of one *R.* the building known as No. 409 *North B. Street*, in said city of *St. Louis*, and has sublet to *G.* the fourth and fifth floors thereof; and whereas, said *G.* has expended a large sum of money in improving and arranging said floors for a photograph gallery; and whereas in the lease from the said *R.* to said *P.*, the right is reserved on the part of *R.* and her heirs, representatives or assigns, upon the happening or not happening of certain contingencies, to declare a forfeiture of said lease, in which event the term granted by said *P.* to said *G.* would also terminate and expire, and the said *G.* would lose the benefit of said expenditures; and whereas, to indemnify the said *G.* in such event, the said *P.* heretofore executed to him a bond of indemnity with one *W.* as surety, and whereas the said *W.* desires to have the said bond cancelled, and the said *G.* has agreed so to do upon being furnished with these presents in lieu thereof.

Now, therefore, if through any act or acts on the part of said *P.*, or his heirs, legal representatives or assigns, the said lease should become forfeited or terminated before the expiration of the term for which the said fourth and fifth floors were let to said *G.*, or if through any fault of the said *P.*, the said *G.* should be ousted from said premises before the expiration of his said term (other than the destruction of said building by accidental fire or by the elements), then this obligation shall remain in full force and effect and the said *P.* and his surety hereto shall pay the said *G.* the sum of *six hundred* dollars as liquidated damages.<sup>1</sup>

<sup>1</sup> From *Guerin v. Stacy*, 175 Mass. 595.

NOTICES TO TERMINATE TENANCY

G. NOTICES TO TERMINATE TENANCY

**Form 70. Landlord to tenant.**

*Springfield, May 10, 1880.*

To *J. S.*, Esq.:

SIR: You are hereby notified to quit and deliver up the premises which you now hold as my tenant on *C. Street* in *Grafton*, on *July 1*, 1880. *E. H.*

**Form 71. — Another form.**

*Boston, Nov. 2, 1893.*

To *P. H.*, Esq.:

SIR: I hereby notify you to quit and deliver up at the end of the next *month* [*or week or quarter as the case may be*] of your tenancy, beginning after this notice, the premises, etc. [*as above*]. *F. G.*

**Form 72. Lessee to tenant at will.**

*Boston, December 15, 1907.*

*C. B. L.*, Esq.:

I hereby notify you that Mr. *E. H.* has executed a written lease to me of the premises now occupied by you at No. 3 *Celestial Park*, in the town of *Brookline*, for the term of *two years* from this date. As I wish to occupy the said premises at once, you will please vacate them without delay. *E. F. F.*

**Form 73. Tenant to landlord.**

*New Bedford, Aug. 6, 1893.*

To *A. H.*, Esq.:

SIR: You are hereby notified that I shall quit and deliver up the premises which I now hold as your tenant on *County Street*, in this city, on *Sept. 1*, 1893 [*or at the end of the next month, etc., as above*]. *K. P.*

**Form 74. Landlord to lodger.**

To *A. B.*, Esq.:

SIR: I hereby give you notice to quit and deliver up on the *sixteenth* day of *January* instant [*or next*], the rooms or apart-

## FORMS OF WRITTEN INSTRUMENTS

ments with the appurtenances in my house, No. 10 C. Street, which you now hold of me.

Dated this *ninth* day of *January*, 1897.

Yours truly,

C. D.

### Form 75. By tenant in common.

To A. B., Esq.:

SIR: I hereby give you notice of my intention to determine the tenancy under which you now hold of me, one undivided *half* part of and in the *store* [or *messuage* or *farm* or *land*, *etc.*], and premises, with the appurtenances, situate at X. in the county of Z., and require you to quit the same on the *fifteenth* day of *October* next.

Dated the *first* day of *October*, 1898.

Yours, etc.,

C. D. [*lessor*].

## H. NOTICES TO QUIT

### Form 76. Landlord to tenant for non-payment of rent.

*Brookline*, Jan. 15, 1891.

H. S., Esq.:

SIR: I hereby notify you to quit and deliver up in fourteen days from the date hereof the premises which you now hold as my tenant at 490 *Walnut* Street, in this town. P. F.

### Form 77. Lessee to tenant at will.

F. G., Esq.:

SIR: You are hereby notified that I have a written lease from W. H. S. of store No. 29 *F.* Street, *G.*, and you are hereby notified to quit said premises without delay, and that I shall hold you responsible for all damage done by you or which you may hereafter do to said store and the property in the same.

J. R.

### Form 78. — Another form.

To J. S.:

SIR: Please take notice that I have this day leased the tenement 28 *W.* Street in said *T.*, the same being the upper tenement

#### NOTICES TO QUIT

or the tenement now occupied by you at said 28 W. Street, as a tenant of my lessor, *Mrs. A. C. H.*, and I further give you notice to quit, vacate, and deliver up to me the said tenement by *Monday, sixth day of July* current, by 12 o'clock noon, or I will take due course of law to eject you from the same.

*J. D. L.*

## FORMS OF PLEADINGS

### PART II

## FORMS OF PLEADINGS

### A. DECLARATIONS IN CONTRACT

#### 1. *Actions by Landlord against Tenant*

##### **Form 79. Use and occupation.**

And the plaintiff says that the defendant owes him the sum of *fifty* dollars for the use and occupation of a certain tenement hired of the plaintiff by the defendant.

##### **Form 80. — Lodgings.**

And the plaintiff says that the defendant owes him the sum of *fifty* dollars for the use and occupation of certain [furnished] lodgings [*or rooms*] in a certain house on *A. Street* in *B.*

##### **Form 81. Board and lodging.**

And the plaintiff says that the defendant owes him *sixty* dollars for board and lodging furnished by the plaintiff for the defendant.

##### **Form 82. Use and occupation upon an account annexed.**

And the plaintiff says that the defendant owes him *fifty* dollars according to the account hereto annexed.

Account annexed.

For *six* months' use and occupation of a certain tenement hired of the plaintiff by the defendant . . . \$50 00

##### **Form 83. Rent on lease.**

And the plaintiff says that he, together with the defendant, made and executed a certain interchangeable lease, a copy of which is hereto annexed, by which the plaintiff let to the defendant [*describe the premises generally, e.g., house, or shop, or building, or buildings and land*] situated on *Q. Street* in the city of *Z.*; that the rent to be paid for said premises was to be *six hundred* dollars a year, payable quarterly; and the plaintiff



## DECLARATIONS IN CONTRACT

says that the defendant occupied said premises for *two years and three months* and was occupying the same on the *first* day of *October, 1872*; and that the defendant owes him for *three* quarters' rent up to the said *first* day of *October, 1872*.

### Form 84. On covenant for rent.

And the plaintiff says that he, together with the defendant, made and executed a certain interchangeable lease [a copy of which is hereto annexed <sup>1</sup>] by which the plaintiff let to the defendant a *house, land, and premises* [give a general description] to hold to the defendant for *three* years, from the *first* day of *January, A. D. 1880*, at *twelve hundred* dollars per year, payable quarterly, that is to say on [give days of payment]; and the defendant thereby covenanted with the plaintiff to pay him the said rent as aforesaid, yet *two* quarters of the said rent are in arrear and unpaid; and the defendant owes the plaintiff the sum of *six hundred* dollars.

### Form 85. On covenant to repair.

And the plaintiff says that he by deed let to the defendant a house No. *63 Lowell Street*, in *Taunton*, to hold for three years from *Jan. 1, A. D. 1882*, and the defendant by said deed covenanted with the plaintiff well and substantially to repair the said house during said term [according to the covenant, which should be stated accurately, giving any exceptions such as casualties by fire, tempest, etc.,]; and yet said house was during said term out of good and substantial repair. [The breach should follow the terms of the covenant and negative the happening of any exceptions.]

### Form 86. On a parol agreement to deliver up premises in good order.

And the plaintiff says that the defendant hired of the plaintiff a certain house and premises for the term of *six years* from the *first* day of *July, A. D. 1870*, upon the terms that the defendant should, at the expiration of the said term, deliver up to the plaintiff the said house and premises, with all the fixtures thereon, in the same state and condition as they were in at the time of the defendant becoming such tenant as aforesaid, reason-

<sup>1</sup> If the legal effect is set out as above it is not necessary to annex a copy.

## FORMS OF PLEADINGS

able wear and tear only excepted; and the said term expired and all conditions were performed, and all things happened, and all things elapsed, necessary to entitle the plaintiff to a performance by the defendant of the said terms; yet the defendant did not, at the expiration of said term, deliver up to the plaintiff the said house and premises with all the fixtures thereon in the same state and condition as they were in at the time when the defendant became tenant to the plaintiff as aforesaid, reasonable wear and tear only excepted.

### **Form 87. On the implied covenant to use premises in a tenant-like manner.**

And the plaintiff says that the defendant hired of the plaintiff a certain messuage and premises upon the terms that he should use the same in a tenantlike manner during said tenancy, and occupied the same; yet the defendant, during said tenancy, used the messuage and premises in an untenantlike and improper manner.

### **Form 88. — Another form.**

And the plaintiffs say that the defendants became and were tenants to the plaintiffs of a certain barn and premises of the plaintiffs situated in said *S. H.*, which they hired for the storage of hay, upon the terms that the defendants should during the said tenancy use the said barn and premises in a tenantlike and proper manner, and the defendants during the said tenancy used the said barn and premises in an untenantlike and improper manner, filling the stable and barn floors with a large quantity of grain, meal, and fertilizers, in addition to the large quantity of hay and grain stored by said defendants in other parts of the barn, so that said barn was overloaded, and the floors and scaffolds and roof broke down, the timbers and supports were broken, and the barn badly damaged, by reason of which the plaintiffs have lost and will lose the rental of the same, and will be put to great expense to repair the same.

### **Form 89. Special count on agreement for lodgings.**

And the plaintiff says that on or about the *twenty-sixth* day of *November*, A. D. 1866, she was a married woman doing busi-

## DECLARATIONS IN CONTRACT

ness on her sole and separate account, and at the said time the owner of a certain house in *C. P.* in the City of *B.* in said County of *S.*, which house said plaintiff then kept for the purpose of a boarding and lodging house; that on or about the said *twenty-sixth* day of *November, 1866*, the said plaintiff, at the special instance and request of the said defendant, made and entered into an agreement or contract with the said defendant substantially as follows: the said defendant in consideration of the said plaintiff agreeing to furnish certain rooms or apartments in said house and to permit the said defendant, his wife, two children, and servant to use and enjoy the same, and agreeing to find and provide board, fire, and light for the said defendant and said persons, he, the said defendant, agreed to pay the said plaintiff the sum of *seventy-five* dollars per week for said lodging and board, fire and light, and also the said defendant in consideration of the aforesaid agreement of the plaintiff agreed to board and lodge with the plaintiff upon the said conditions from on or about the *twenty-sixth* day of *November, 1866*, to the *first of May, A. D. 1867*; and the said plaintiff relying upon the promise of the said defendant to pay the said sum of *seventy-five* dollars per week, and to board and lodge with the plaintiff from on or about the said *twenty-sixth* day of *November* to the *first* day of *May* as aforesaid, did furnish said rooms or apartments, did permit said defendant, his wife, children, and servant to occupy and enjoy the same, and did find and provide board, fire, and light as aforesaid. And the said defendant, his wife, children, and servant did on or about the said *twenty-sixth* day of *November, 1866*, occupy and enjoy said rooms or apartments, and were as aforesaid provided with board, fire, and light, and did continue to board and lodge with the said plaintiff upon said conditions till on or about the *twelfth* day of *January, 1867*, when the said defendant, his wife, children, and servant did without notice to the plaintiff, without legal reason or excuse, and not regarding the said promise and undertaking of the said defendant, leave the house of the said plaintiff and did cease to lodge and board with her, and has ever since ceased to lodge and board with the said plaintiff.

And the said plaintiff says that she was always ready and willing during the time from the said *twelfth* day of *January*

## FORMS OF PLEADINGS

to the said *first* day of *May* to permit said defendant, his wife, children, and servant to use and enjoy said furnished rooms or apartments, and to find and provide board, fire, and light for the said defendant, his wife, children, and servant; but the said defendant not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in his behalf, did not board and lodge with the plaintiff as above stated during any part of said period from *January twelfth* to *May first*, but wholly neglected and refused so to do, whereby the plaintiff hath lost and been deprived of divers great gains and profits which might and otherwise would have arisen and accrued to her if the said defendant had fulfilled his promise. And the said plaintiff further says that by reason of said breach of contract on the part of the defendant, she was deprived of an opportunity of leasing her said house at a certain rent and profit payable to the plaintiff, in that at or about the time said defendant promised as aforesaid, she, the plaintiff, was about to lease her house to a certain person, but relying upon the offer, promise, and undertaking of the said defendant, she refused to lease said house as aforesaid, and thereby the said plaintiff has lost divers great gains and profits which she would have otherwise enjoyed and received; and the said plaintiff further says that at the time the said defendant entered into said agreement she had or might have had opportunities to take other persons to lodge and board with her if the said rooms had been vacant. And the plaintiff says that she has suffered damage from the aforesaid neglect and refusal of the defendant to the amount of *twelve hundred eighty-three dollars and fifteen cents*. And therefore she brings this suit.

**Form 90.** For not spreading hay, etc., nor spending manure, etc., upon the premises, but carrying them off, etc.

[*Allege lease and covenant as usual, and then continue:*]

And the plaintiff further says that the said S. [*lessee*] during the said years, etc., or in any of them, or at any time since, did not spend and spread out on the premises all the hay, straw, and stover during the years arising thereupon (except wheat straw, rye straw, and clover hay), but therein wholly failed, contrary to the form and effect of the same indenture and of the said

## DECLARATIONS IN CONTRACT

covenant of the said S., made in that behalf as aforesaid. And the plaintiff further says, that the said S. has not within the *six* last mentioned years nor in any or either of them at any time since laid or spread upon any part of the said premises all or any of the muck, dung, manure, and compost, which during all that time was raised and made there on the premises, but therein did wholly fail and make default, contrary to the form and effect of the said indenture, and of the said covenant of the said S., made in that behalf as aforesaid. And the plaintiff further saith, that the said S., in each and every of the said years, etc., carried off from the said demised premises diverse great quantities, viz., *one hundred cart-loads of hay, one hundred cart-loads of straw, one hundred cart-loads of dung, etc.*, which during those years arose, was made, and raised on the said demised premises; the said hay, straw, and stover being other hay, straw, and stover than wheat straw, rye straw, or clover hay; yet the said S. has not allowed or paid the plaintiff *ten dollars* a load for every load of the said hay, and *seven dollars* a load for every load of the straw, etc., that there was carried off the said premises, or any part thereof, but hath therein wholly failed and made default, contrary to his said covenant.

### 2. *Heir of Lessor against Lessee*

#### Form 91. General form.

And the plaintiff says that one E. F., [lessor] now deceased, being seized in fee of certain tenements, by deed, let the same to the defendant [*state the lease and covenant and allege the breach as in the preceding forms, alleging the covenant to have been made with the said E. F. and his heirs*], and the said E. F. afterwards, and during the said term, died so seized of the the said reversion of and in the said demised premises, whereupon the said reversion descended to the plaintiff as [*state the relationship*] and heir of the said E. F. deceased [*assign breaches as usual, showing that they were committed after the death of the said E. F.*].

### 3. *By Executor of Lessor, a Termor, against Lessee*

#### Form 92. General form.

And the plaintiff says that one E. F., being possessed of a

## FORMS OF PLEADINGS

house [*describe premises generally as above*], for the residue of a certain term of *twenty-five* years, commencing from the first day of *July* A. D. 1860 [*set out the lease and covenant as usual*], and the said *E. F.* being possessed of the said reversion in the said premises, during the said term, died having duly made and published his last will and testament in writing, and thereby appointed the plaintiff executor thereof, after whose death the plaintiff duly proved the said last will and testament, and took upon himself the execution thereof, and the plaintiff, his executor as aforesaid, became possessed of the said reversion of and in the said tenements; yet [*alleging breaches as usual, stating whether they occurred in the lifetime or after the death of the said E. F.*].

### 4. *By Devisee of Lessor against Lessee*

#### Form 93. General form.

And the plaintiff says that one *E. F.* [*lessor*] now deceased, being seized in fee of certain tenements, by deed let the same to the defendant [*state the lease and the covenant of the defendant, alleging them to have been made with the said E. F. and his assigns*]; and the said *E. F.*, afterwards and during the said term, died so seized of the said reversion of and in the said premises, having first duly made and published his last will and testament in writing, and thereby devised the said reversion of and in the said demised premises to the plaintiff, yet [*assign breaches as above, showing that they were committed after the death of the said E. F. and during the said term*].

### 5. *By Lessor against Assignee*

#### Form 94. On covenants to pay rents and to repair.

And the plaintiff says that he by deed did let *A. B.* [*set out the lease, terms, and covenants as to rent and repair*]; and that after the making of said deed, and during the said term of years, the interest and estate of the said *A. B.* in and to the said premises vested in the defendant by assignment; yet that during the said term and after the said assignment, *two* quarters of the said rent became due, and that during the said term and after the said assignment, said house was out of good repair.

## DECLARATIONS IN CONTRACT

### 6. *By Assignee of the Reversion against Lessee*

#### **Form 95. General form.**

And the plaintiff says that whereas one *H.* [lessor], being seized in fee of certain *messuages* [*describing the premises shortly*], by deed, let the same to the defendant to hold for *seven* years from the *first* day of *October*, A. D. 1860, at *six hundred* dollars per year, payable *quarterly*, that is to say, on [*state days of payment; state the covenant with original lessor and his assigns*]; and the said *H.* [lessor], being so seized of the said reversion as aforesaid, afterwards and during the said term granted, conveyed, and assigned to the plaintiff the said reversion in the said demised premises; yet [*state the breaches in the usual form, alleging that they occurred after the plaintiff became seized as aforesaid*].

#### **Form 96. Where assignee is a termor.**

And the plaintiff says that one *E. F.* [lessor], being possessed of a house, and land, and premises, situated upon *A.* Street in *B.*, for the residue of a certain number of years commencing on the *first* day of *July*, A. D. 1850, by deed let the same to the defendant [*here state the lease and covenants broken, alleging them to have been made by the defendant with the said E. F. and his assigns*], and the said *E. F.*, being possessed of and in the said reversion therein, by deed assigned the same to the plaintiff; yet the plaintiff says that [*state the breaches as in terms given above, showing that they occurred during the term and after the plaintiff became possessed of and in the said reversion as aforesaid*].

### 7. *By Lessee against his Assignee*

#### **Form 97. On covenant to pay rent to lessor.**

And the plaintiff says that *A. B.* [lessor] let to the plaintiff and his assigns a certain house and land situated on *K.* Street in *W.* to hold for the term of *three* years from the *fifteenth* day of *October*, 1860, at the yearly rent of *six hundred* dollars payable *quarterly*, and the plaintiff, being possessed of the said premises during the said term, by deed assigned to the defendant all his interest and estate therein, subject nevertheless to the pay-



## FORMS OF PLEADINGS

ment of said rent and the performance of the covenants and agreements which the lessee was thereby required to perform. And the defendant covenanted with the plaintiff that he the defendant would well and truly pay the rent which should thereafter become due according to the terms of the lease, and would perform all the covenants and stipulations in the lease contained, which were to be performed on the part of the lessee [*or other words following the form of the covenant*]; yet the plaintiff says that after the defendant became such assignee, and during said term the rent for one quarter, amounting to *one hundred and fifty* dollars, became due; yet the defendant neglected to pay the same, whereupon the plaintiff was obliged to pay and did pay the same to the said *A. B.* [*or, in case the rent or reversion has been assigned to C. D., who then had lawful right and title to the said premises subject to said lease*], of which the defendant had notice, but the defendant has not repaid the same to the plaintiff, and the plaintiff is now damaged to the amount thereof.

### 8. *By Lessee against Sublessee*

#### **Form 98. On covenant to repair.**

And the plaintiff says that by an indenture dated *May 10, 1858*, *A. B.* demised to the plaintiff a certain messuage and premises with the appurtenances, for the term of *twenty-one* years from the *twenty-fifth* day of *March* then last, at a yearly rent; and that the plaintiff thereby covenanted with the lessor that he, the plaintiff, his executors, administrators, and assigns, should and would at his and their own cost, once in every three years of the term thereby granted, well and sufficiently paint all the outside wood and iron work of the said messuage and premises; and also once in seven years of the said term paint all the inside of the said messuage and premises; and also should from time to time well and sufficiently repair, pave, support, maintain, cleanse, empty, amend, and keep the messuage and premises, with the appurtenances, by all necessary repairs, and clean (casualties by fire always excepted), when and as often as occasion should require, and should at the expiration of the term peaceably surrender to the said *A. B.* and his heirs, executors, administrators, or assigns, together



## DECLARATIONS IN CONTRACT

with all erections and improvements made and added or to be made and added thereon or therein, and all the fixtures and appurtenances thereof in good condition (reasonable use and wear thereof and casualties happening by fire to such fixtures in the meantime only excepted) and further that it should be lawful for the said A. B., his heirs, executors, administrators, or assigns, either alone or with workmen, at all reasonable times, during said term, to enter upon any part of the said demised premises to examine the condition thereof, and upon any such examination that he, the plaintiff, his executors, administrators, or assigns, should and would, upon notice thereof being left at the demised premises, within *three* months next after any such notice, well and sufficiently make all repairs and amendments, whereof any such notice should be given or left as aforesaid (damages happening by fire excepted, as aforesaid).

And the plaintiff says that by another indenture made between the plaintiff and the defendant, on the *fifteenth* day of *June*, 1860, the plaintiff demised the same premises to the defendant, for the term of nineteen years, on the *twenty-fifth* day of *March* then last, at a yearly rent, and the defendant thereby entered into covenants with the plaintiff [*set out the covenants*].

And the plaintiff says that the defendant did not paint and did not repair, although the original lessor entered upon the premises to examine the condition thereof, and, finding it defective, gave *three* months' notice of the defections; by reason of which said breaches of covenant, the plaintiff afterwards and before the commencement of this suit, to wit: on *Dec. 4*, 1872, was obliged to pay, and did pay, to the original lessor the sum of *two hundred dollars* damages and *twenty-six dollars* costs by them recovered in an action of contract on account of certain breaches of the covenants entered into by the plaintiff with the original lessor in the said indenture first mentioned; and that the said covenants in the two indentures above mentioned have a like force and effect, and that the breaches of covenant for which the original lessor recovered his damages and costs were the same breaches committed by the defendant; and the plaintiff was called upon, and forced to

pay, and did pay, the sum of *twenty dollars* for his costs incurred in his defence to the said action.

9. *By Agreed Lessee against Owner*

**Form 99. For failure to grant a lease according to agreement.**

And the plaintiff says that before the *twenty-ninth* day of *September, 1884*, viz., on or about the *twenty-sixth* day of *July, 1844*, by a certain agreement in writing made between the defendant of the one part and the plaintiff of the other part [*insert recitals of agreement*], it was mutually agreed that the defendant should grant, and the plaintiff should accept, a lease of all the farm and land [*as in the above recitals, or give a general description, stating reservations and exceptions if any*] at the yearly rent of *one thousand* dollars; the said lease so agreed to be granted and accepted, to commence on the *twenty-ninth* of *September, 1844*, if the defendant could then legally execute the same or so soon thereafter as the defendant should be in condition to grant the same; that it was thereby further agreed by and between the plaintiff and the defendant [*set out the covenants which were to be in the lease according to the agreement*], and the plaintiff further says that although he, the plaintiff, has always from the time of making of the said agreement been ready and willing to accept the said lease so agreed to be granted and accepted as aforesaid, and to execute and deliver a counterpart thereof to the defendant, according to the terms of the said agreement; and although the said *twenty-ninth of September, 1844*, and a reasonable time for the defendant to grant the said lease, elapsed before the commencement of the suit; and although the defendant, on said last mentioned day, and from thence continually hitherto, was in the situation to grant, and could legally make and execute such lease, and during all the time aforesaid has had notice of the matters hereinbefore mentioned; yet that the defendant, disregarding his said promise, did not on the said *twenty-ninth of September, 1844*, nor has he at any other time, though often requested so to do, granted to the plaintiff the said lease, but has wholly neglected and refused so to do; and that thereby the plaintiff has lost and been deprived of the benefits and advantages of the said lease.

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and divers large gains and profits, to wit: to the amount of *two thousand* dollars, which would have accrued to him from the granting of the same.

### **Form 100. On implied covenant for title.**

And the plaintiff says that on *June 3, 1862*, the defendant and the plaintiff agreed, by an agreement in writing [*set out the agreement*]; that all the conditions were fulfilled [*set them out*]. Yet the plaintiff says that the defendant never had any right or title to let the said farm to the plaintiff for the said term.

## B. DECLARATIONS IN TORT

### *1. By Landlord against Tenant*

#### **Form 101. For permissive waste.**

And the plaintiff says that the defendant was tenant to the plaintiff of a certain dwelling-house on *C. Street* in *Boston* for the term of *ten* years from the *second* day of *October*, A. D. *1870*, and during the said tenancy wrongfully permitted waste to the said dwelling-house, by suffering the same to become and be ruinous and in decay, to wit, in the doors, windows, and roofs of the said dwelling-house, for want of needful and necessary repairing thereto.

#### **Form 102. For voluntary waste by injuring premises and removing fixtures.**

And the plaintiff says the defendant was tenant to the plaintiff of a certain dwelling-house, and the defendant during the said tenancy wrongfully damaged parts of the said dwelling-house and wrongfully severed the fixtures affixed thereto, and converted the same to his own use, and at the termination of the said tenancy delivered the said dwelling to plaintiff greatly damaged [*if the action is brought before the end of the tenancy, omit the last clause*].

#### **Form 103. For overloading premises (tort or contract).**

##### *Count in Tort*

And the plaintiffs say that the defendants became and were tenants to the plaintiffs of a certain barn and premises of the

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plaintiff, situated in said *South Hadley*, which said defendants hired for the storage of hay, and when so keeping and using said barn and premises as such tenants, they wrongfully and unlawfully, and without the license and against the will of the said plaintiffs, stored and filled the barn floors, passageways and stables of said barn with meal, grain and fertilizers, all of which were quite weighty, and having also filled the remaining space in the barn with hay and grain, so that the entire space in the barn was filled or nearly filled with material and substance much too weighty; said barn not having been constructed or calculated to sustain such a quantity of heavy grain, hay and substance as the defendants placed therein; and said defendants so overloaded said barn as aforesaid that the floor gave way. The timbers, braces and supports of said barn were drawn out of place and broken. The scaffold and roof were broken down, and the entire building badly damaged by reason of the enormous weight so wrongfully and unjustly and improperly placed therein by said defendants. By means of which damage said plaintiffs have lost and will lose the use and rental of said barn, and have been and will be put to great loss and expense to repair the same.

### *Count in Contract*

And the plaintiffs say that the defendants became and were tenants to the plaintiffs of a certain barn and premises of the plaintiffs situated in said *South Hadley*, which they hired for the storage of hay, upon the terms that the defendants should during the said tenancy use the said barn and premises in a tenantlike and proper manner; and the defendants during the said tenancy used the said barn and premises in an untenantlike and improper manner, filling the stable and barn floors with a large quantity of grain, meal and fertilizers in addition to the large quantity of hay and grain stored by the said defendants in other parts of the barn, so that said barn was overloaded, and the floors and scaffolds and roof broke down, the timbers and supports were broken, and the barn badly damaged, by reason of which the plaintiffs have lost and will lose the rental of the same, and will be put to great expense to repair the same.

The Count in Contract is joined with the Count in Tort, it

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being deemed doubtful to which of these classes the above cause of action belongs, and both being for one and the same cause of action.

### Form 104. For waste by tenant at will.

And the plaintiff says that on the *twentieth* day of *January*, A. D. 1880, he was seized and possessed in his own right of a *certain four-story wooden factory building*, of great value, to wit: of the value of *twelve thousand dollars*, situated on *P. Street* in said *S.* and known as the *W. Factory*, and of certain *machines* and other property therein, to wit: [*enumerate property*]; and all of the value of *five thousand eight hundred dollars*; and that he so continued to be the owner of all said property thenceforward to and at the time whereof same was destroyed by fire as hereinafter stated. That on the said *twentieth* day of *January* he orally leased or let the said *factory building* and the premises and *machines* (except *one room on ground floor used by the plaintiff in manufacturing stockings, and said knitting and winding machines, and said yarn and other stocking materials which were situated therein, and used by the plaintiff*) to these defendants for the term of *one* year from and after said day for and in consideration of a certain annual rental then and there agreed upon between him and said defendants, and stipulated to be paid by them; that the said defendants thereupon entered upon the premises, took possession thereof and of said machines as tenants as aforesaid of the plaintiff, and as such tenants there remained in possession, use, and occupation of all said leased property thenceforward until and after the *tenth* day of *December* following. And the plaintiff says that, in consideration of said letting and use, the defendants promised the plaintiffs that they would use said property so leased to them with ordinary and reasonable care and diligence, that they would not, during the term, make or suffer waste thereof or any unlawful or improper use thereof, and that they would, at the end of said term, deliver up said premises and property to the plaintiff in like good order and condition as they received them, reasonable use and wear thereof and damage by unavoidable fire and other casualty only excepted. And the plaintiff says that the defendants have not fulfilled or

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performed their said agreements in the following respects, viz.: that they did not use ordinary and reasonable care of the property so leased to them, but so carelessly, negligently, and recklessly kindled, managed, and maintained fires in their said premises, that by their negligence and misdoing in that behalf, the said building, machinery, yarn, and other property was, on said *tenth* day of *December*, A. D. 1880, destroyed by fire. That they have committed waste of said property so leased to them, and unlawfully and improperly caused all said property to be destroyed by fire, thereby causing the destruction of the whole of said building, machinery, and other property.

And the plaintiff furthermore deeming it doubtful to which class his particular class of action belongs, joins the following count in tort, and avers that both are for one and the same cause of action, to wit: the plaintiff says that on the *twentieth* day of *January*, A. D. 1880, he was the owner of a certain *four-story wooden factory building* situated on *P. Street*, of great value, to wit: of the value of *twelve thousand dollars*, situated in said *S.*, and known as the *W. Factory*; and of certain machines and properties therein, viz.: [*enumerate articles and value*]; and that he so continued to be the owner of all said property thenceforward to and at the time when the same was destroyed by fire as hereinafter stated.

That on the said *tenth* day of *December* said defendants wrongfully and unlawfully caused said building and all said machines and other property to be destroyed by fire.

### 2. *By Tenant against Landlord*

#### Form 105. For deceit in letting property.

And the plaintiff says the defendant, to induce the plaintiff to hire a certain dwelling-house on *F. Street*, in *B.*, to be used and occupied by the plaintiff and his family as a dwelling-house, falsely represented to the plaintiff that the *drains and plumbing* belonging to said house were in proper order and condition, and that said house was safe and fit for occupancy. And thereupon the plaintiff, believing said representations to be true, was induced to hire and did hire said dwelling-house and did occupy the same with his family.

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The plaintiff says that the said *drains and plumbing* were not in good order and condition, but were in an imperfect, dangerous, and unsafe condition, and the said house was not safe or fit for occupancy; all of which the defendant well knew, but none of which the plaintiff knew; that the plaintiff using and occupying said house was thereby himself made ill with *typhoid fever* and suffered greatly therefrom and still suffers greatly, and has been incapacitated from attending to his business, and has been put to great trouble and expense for himself and the rest of his family and for medical attendance for them, and has lost their assistance and service in supporting and earning money for themselves; that two of his children were taken sick and died of *typhoid fever* in consequence of said false representations, and he was put to great expense in caring for them while sick and burying them after their death; that he has endured great anxiety lest other members of his family should be made sick from contagion and living in the same house with those members of his family who were already sick of *typhoid fever*, and in all this he was in the exercise of due care.

### Form 106. For eviction.

And the plaintiff says that the defendant by deed demised to the plaintiff certain premises [*give general description as above*] to hold for *six* years, from the *tenth* day of *March*, A. D. 1865, and the defendant thereby covenanted with the plaintiff, that he, the plaintiff, his executors, administrators, and assigns, paying [*set out the terms upon which the lessee was to peaceably enjoy, as given in the lease*], should peaceably hold, occupy, and enjoy said premises during said term, without interruption or disturbance by him, the defendant, his heirs, assigns, or any other person or persons, lawfully claiming by or in him or them; and although the plaintiff has performed all conditions [*as above*], yet after the said demise and during the said term one X., who, at the time of the demise to the plaintiff, and thence hitherto, claimed to have and had lawful right and title to the said premises and the possession thereto, under the defendant, entered into the said premises and evicted the plaintiff therefrom [*if there has not been any actual eviction say molested and disturbed the plaintiff in the possession thereof*].



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### **Form 107. For carrying away property and for eviction.**

And the plaintiff says that the defendant forcibly entered the plaintiff's close situated in *L.* in said county, bounded [*set out the description*], and then and there took and carried away from the plaintiff's dwelling-house on said premises the plaintiff's household furniture, beds and bedding, and clothing of the plaintiff his wife and minor children, and also the plaintiff's provisions that were in said house, and left a portion of said property out of doors in the rain and wet and snow, and greatly injured said goods and personal property, and converted the same to his own use, and drove and expelled the plaintiff and his family and minor children and infant children from said house, and turned the plaintiff and his family out of doors into the damp, wet, and unhealthy weather without sufficient clothing, whereby and by reason whereof the plaintiff and his wife and minor children were exposed to the damp, wet, rainy, and snowy weather and thereby became sick and their health greatly injured, and the plaintiff by reason thereof has been subjected to great expense and loss and his feelings greatly injured.

### **Form 108. For assault during entry.**

And the plaintiff says the defendant made an assault upon her, armed with an iron crowbar, and shook his fist in her face, and put her in great bodily fear.

And the plaintiff further says the defendant made another assault upon her and knocked her down and inflicted upon her serious injuries.

### **Form 109. For injury from defects in common stairway.**

And the plaintiff says the defendant owns or controls a certain building, situated on *C. Street*, in *B.*, in said county; that said building is rented by her to various persons including the plaintiff as tenant at will; that a tenement was hired and occupied by the plaintiff on the second floor of said building; that on the second floor is a narrow entry or passageway, leading to a certain stairway, which stairway descends to the street door of said building, in the rear; that said entry or passageway and said stairway are provided by the defendant for the use of the



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tenants of said premises, to be used by them as incident to the occupation of said premises; that said defendant has exclusive control of said entry or passageway and said stairway, and is bound to maintain and keep the same in repair for the use of said tenants, including the plaintiff; that said entry or passageway is improperly lighted, narrow, abrupt, and dangerous, and said stairway is wholly without rails or other guards; that said defendant failed and unreasonably neglected to make proper repairs, and to render the same safe for the use of said tenants, including the plaintiff; that on or about *March 10, A. D. 1888*, the plaintiff, a tenant as aforesaid, being lawfully on said entry or passageway and said stairway, and in the exercise of due care, and because of the carelessness and negligence of the defendant aforesaid, fell down said stairway, and suffered thereby painful and permanent injuries.

### **Form 110. For negligence in making repairs.**

And the plaintiff says that he was tenant to the defendant of a certain shop and land for the term of *three years from October first, 1875*; and the said shop was dilapidated and out of repair, and in part not fit for occupation; and the defendant entered upon and in part performed certain repairs necessary to be made, and which the plaintiff was not legally bound to make; yet the defendant did not use due care, skill, or diligence in making and completing said repairs, but wrongfully neglected and refused so to do, whereby the said shop was greatly and unnecessarily damaged, and the said repairs were not proceeded with or performed within a reasonable time, and thereby the plaintiff was put to great loss in regard to his use, occupation, and enjoyment of the said shop, and was deprived of the use of a great part thereof for a long time, and incurred great expense in repairing the said premises.

### **Form 111. By lodger of tenant, for failure to keep common premises in repair.**

And the plaintiff says that the defendant, for a long time prior to and on *May 18, 1894*, was the owner of a tenement building, *four stories high, on G. Place in B.*; that said building had four entrances, and the entrance-ways had common halls and stair-

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cases running up from first floor to the fourth floor and to the flat roof; that there was a separate tenement on each of said floors to each entrance-way, and that said common halls and stairways were reserved by said defendant for the common use of all tenants; that said flat roof was covered with a platform and partitioned by fences and reserved by said defendant for the common use for drying clothes and other common purposes for the tenants of the third and fourth floors; and that it was the understanding of said defendant with the tenants of said third and fourth floors that said roof was to be kept open and controlled by the defendant as necessary for their common use; that one *Mrs. C. D. P.*, a widow, several years prior to said *May 18, 1894*, hired of the said defendant, with the aforesaid understanding respecting the common use of said roof and passageways, the tenement on the third floor of the fourth entrance-way of said building; and that, at the time of hiring, the platform of the roof connected with her tenement was in good repair and condition, and that it was the duty of said defendant to use due care to keep said platform in as good condition as it was at the time of hiring; but said defendant, well knowing that said platform was always exposed to the weather and was liable to fall into rapid decay, wholly neglected his said duty and negligently suffered said platform to grow and become rotten and unsafe, and negligently omitted to repair and keep in repair said platform, and that on said *May 18, 1894*, said platform had become rotten and unsafe, which then was not apparent upon the upper surface of said platform.

And said plaintiff says that on and prior to *May 18, 1894*, she was a boarder with the said *Mrs. C. D. P.*, in her tenement hired of said defendant, and also at times assisted her about her household work in part compensation for her board; and that on said *May 18, 1894*, in the course of her employment in assisting *Mrs. P.*, she went upon said roof, and while working there for *Mrs. P.*, a board of said platform suddenly broke and gave way under her feet, and she was thereby thrown backwards and struck her spine with great force against some sharp corner of the skylight structure, which projected above said platform, and was thereby greatly and permanently injured, and has been put to great expense for medical attendance and nursing. And

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she says, further, that she had no notice or knowledge that said platform was rotten or unsafe, and that at the time of her said injury she was in exercise of due care, and that said defendant's said negligent acts and omissions caused her said injuries.

### **Form 112. By lodger, for obstruction in the use of lodgings.**

And the plaintiff says that he hired of the defendant certain furnished lodgings in a dwelling-house situated upon *L. Street*, in *L.*, upon the terms that he should have for himself, his family, friends, and customers, free access into and out of the said rooms, up and down the stairs leading to the same, and the benefit of a skylight and of a closet situated on the first floor of the said house and of a door-bell at the side of the door of said house; yet that the defendant wrongfully covered the banisters of the staircase with filthy and sticky matter, blocked up the skylight, removed the closet, and cut the bell wire; by means of which *X.* and *Y.* who lodged in two of the side-rooms, refused to continue to do so, and certain customers of the plaintiff [*name them*] ceased from dealing with the plaintiff.

### **3. By Landlord against Third Person**

#### **Form 113. For trespass.**

And the plaintiff says the defendant forcibly entered the plaintiff's close [*describing it*], on or about *April 1, 1871*, and without license wilfully cut down and took and carried away *one elm-tree* and *one oak-tree*, and *divers other trees* of the property of the plaintiff, there being and standing thereon, and converted the same to his own use.

#### **Form 114. For injury to plaintiff's reversion.**

And the plaintiff says that *A. B.* was tenant to the plaintiff of a certain dwelling-house and land, the reversion thereof being in the plaintiff; and the defendant wrongfully injured the plaintiff's said reversion by pulling down a portion of the said house, by trampling down the grass growing upon the said land, and by digging holes in the soil.

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### 4. *By Third Person against Landlord*

#### **Form 115. For injury from defective premises.**

And the plaintiff says that at the time of the grievance hereinafter set forth the defendant owned and controlled a certain block in C., in said county, occupied by tenants, for whose use he furnished a hoisting fall and tackle; that said hoisting fall and tackle were defective, insufficient, and unsafe, and were negligently and carelessly permitted by the defendant to be defective, dangerous, and out of repair, and that while the plaintiff was using said hoisting fall and tackle in hoisting coal to the tenement of one of defendant's tenants, and while in the exercise of due care, said fall and tackle broke and fell on plaintiff, causing him serious injuries.

#### **Form 116. For injury from defective common steps in control of landlord.**

And the plaintiff says that the defendant owns and controls a certain building situated on *Mosher* Street in *New Bedford* in said County; that portions of said building are rented by her to different tenants; that on the east side of said building is a walk leading from said *Mosher* Street and a flight of steps with a small platform at the top leading to the back entrance to said building; that said walk, steps, platform and back entrance are for the common use of the tenants of said building; that said steps and platform are within the control of the defendant and she was bound to keep the same in repair and safe and proper for the use of the several tenants of said building and such persons as came to see said tenants, or either of them, upon the invitation or request of said tenants, or either of them; but that the defendant negligently failed so to do and permitted and negligently suffered the said steps and platform to be defective, out of repair, in a dangerous condition and unfit for use; whereby the plaintiff while rightfully, upon the invitation of a tenant of said building, being upon said platform and steps and passing thereover, in the exercise of due care, was seriously injured in body and mind, by reason of said defective condition of said platform and steps, and suffered great pain and was put to great expense for medicine and medical attendance.

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### Form 117. For injury from falling ice and snow.

And the plaintiff says the defendant corporation, at the time of the injury herein set forth, was the owner of a certain building or block in *Lawrence* in said County of *Essex*, abutting on and in a line with a certain street called *Canal Street* which has been open to and used by the public for more than thirty years as a public highway, and extending from *B. Street* to *U. Street*, both of which are public highways crossing said *C. Street*, and that there are other public highways entering into said *C. Street* so that it is and has been for a long time used by the public generally, and is dedicated to public use:

That there is a sidewalk along the northerly side of said *C. Street* which sidewalk is a part of said *C. Street*.

That said building of said corporation is four stories high and has a slate pitch roof slanting toward said *C. Street* sidewalk, with no protection to keep the snow and ice from falling upon people passing along in front of said building.

That the said building extends from *H. Street* to *A. Street* along and in a line with said *C. Street*.

That the defendant was bound at the time of the injury herein set forth to keep the roof of said building in a safe condition so that all persons could pass it along said sidewalk without injury of being injured; but the defendant being wholly regardless of its duty in this respect negligently suffered a large quantity of snow and ice to collect on the roof of said building at a great height above said sidewalk, so that it was unsafe and dangerous for people to pass by said building along said sidewalk.

That while the plaintiff, on or about the *13th* day of *January*, A. D. 1886, was walking along said sidewalk in front of said building in a proper manner and in the exercise of due care a large quantity of snow and ice, which the defendant had negligently suffered to collect upon the top of said building, fell upon her and threw her, with great force and violence, down upon said sidewalk, and she was greatly injured, bruised and maimed thereby, and put to great pain and distress of body and mind and to great pecuniary expense in and about the long sickness consequent upon the injury aforesaid and to the loss of her earnings during said time, also to great expense for

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medicine, medical aid and attendance to her damage in the sum of five thousand dollars.

### 5. *By Third Person against Tenant*

**Form 118. For injury from negligent use of elevator well.**

And the plaintiff says that the defendants and himself were tenants of two separate stores in the same building on A. Street in *Boston* in said County and each occupied the same as merchants; that there was in said building on the 3d day of *January* last past an elevator or hoist way commonly used by the defendants to move merchandise: that the well hole of said elevator at its opening through the floor of the store of the plaintiff was properly fitted with trap doors and a railing by means of which said well hole was designed and required by law to be kept at all times closed and separated from the rest of the plaintiff's store, and the same was so customarily used by the defendants, their servants and agents. That the defendants were bound in the use of said elevator at all times by the use of said doors and railing or one of them to keep said well hole so closed and separated and to use by themselves and their servants and agents the said elevator with due care and skill: that on said day the defendants by themselves, their servants and agents did negligently and carelessly use said elevator, and did negligently and unlawfully leave said well hole at its opening through the floor of the plaintiff's store open and unprotected and did negligently and carelessly fail to make use of said doors and railing to close said well hole whereby the plaintiff while lawfully there and using due care was hurt and has spent large sums in endeavor to recover from his injuries so sustained and has suffered thereby great and special loss in his business as merchant by his consequent inability to attend thereto for many weeks.

## C. ANSWERS IN CONTRACT

### 1. *Landlord against Tenant*

**Form 119. General denial.**

[*Note.* — Where an action was brought for rent upon a count

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in *indebitatus assumpsit*, the general issue was formerly *nunquam indebitatus*. Under the practice act the place of this plea is taken by the general denial, and such general denial includes the following matters of defence: (1) a denial of tenancy and the amount of rent due; (2) an eviction; (3) a surrender; (4) the existence of a lease under seal; (5) payment to assignee of reversion, or to mortgagee of the lessor; (6) payment of rent to one who has recovered against the lessor in an action affecting title to the land, after notice.]

### **Form 120. Denial of execution of lease and general denial.**

And now comes the defendant, and for answer denies that he ever executed any lease as alleged, or ever became the tenant of the plaintiff, or owes him any sum whatever, and further denies each and every allegation in said writ and declaration contained.

### **Form 121. Denial of parol demise.**

And now comes the defendant and says that the plaintiff did not let the said house and land to the defendant upon the terms alleged in the plaintiff's declaration.

### **Form 122. Denial that any rent was due.**

And now comes the defendant and says that the rent claimed in the plaintiff's declaration had not, nor had any part thereof, become due at the commencement of this suit.

### **Form 123. Payment of rent.**

And the defendant comes and answers that he has paid the plaintiff the sum of *fifty* dollars, which was the full amount stated in the plaintiff's declaration [or bill of particulars].

[*If there are several items add:*] and he annexes hereto a bill of particulars of said payment.

### **Form 124. Another form.**

And now comes the defendant and says that if he ever owed plaintiff anything of the sums mentioned in the plaintiff's declaration, the same has been paid.

And now comes the defendant and says that he paid the rent mentioned in the plaintiff's declaration to the plaintiff when it

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became due, according to the terms of the lease mentioned in the plaintiff's declaration.

### **Form 125. Tender.**

And the defendant comes and says that, before the plaintiff sued out his writ, he tendered to the plaintiff said sum of *fifty* dollars, and now brings the same into court for the plaintiff.

### **Form 126. Surrender.**

And now comes the defendant and says that before the rent mentioned in the plaintiff's declaration became due, it was agreed between the plaintiff and the defendant that the said tenancy should be put an end to, and in pursuance of such agreement the defendant gave up to the plaintiff and the plaintiff took possession of the said demised premises.

### **Form 127. — Another form.**

And further answering, the defendant says said lease, if it ever existed, was surrendered and such surrender accepted by the plaintiff.

### **Form 128. Plea that only part of the rent declared for became due.**

And now comes the defendant and says that, except the sum of *one hundred dollars*, part of the rent mentioned in the plaintiff's declaration, no part of the said rent in the said declaration became due or payable according to the terms of the said agreement [*or lease*], at any time before the commencement of this suit.

### **Form 129. Plea of assignment of reversion before breach of covenant.**

And now comes the defendant and answering says that the said *A. B.* [*lessor*], being possessed of a reversion in the said demised premises before any of the breaches alleged in plaintiff's declaration and during the term granted by the supposed indenture therein referred to, and before the commencement of this suit, to wit: on *Jan. 1, 1850*, did assign, transfer, and set over to one *M.* the said reversion.



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### **Form 130. Plea of eviction.**

And now comes the defendant and answering says that he was evicted from said premises by the plaintiff.

### **Form 131. — Another form.**

And now comes the defendant and says that before the rent mentioned in the plaintiff's declaration became due and before this suit, the plaintiff, against the will and consent of the defendant, wrongfully entered into and upon the said messuage and premises, and evicted the defendant from the possession, use, and occupation thereof.

### **Form 132. Plea of partial eviction treated as a complete eviction.**

And now comes the defendant and says that before the rent mentioned in the plaintiff's declaration became due, and before suit, the plaintiff, against the will and consent of the defendant, wrongfully entered upon a certain close, being part of the premises demised by the plaintiff to the defendant, and which was then held by the defendant as a part of the premises mentioned in the plaintiff's declaration, and evicted the defendant from the possession and enjoyment thereof, whereupon the defendant requested the plaintiff to restore to him, the defendant, the possession of the said close, but plaintiff refused so to do, whereupon the defendant, before any of the above-mentioned rent became due and payable, gave up the possession of the residue of the said premises.

### **Form 133. Plea to an action for non-repair.**

(1.) And now comes the defendant and answering says that he did not suffer and permit the dwelling-house and other buildings upon the demised premises to be and continue ruinous, decayed, and in a dangerous condition for want of necessary repair, as alleged in the plaintiff's declaration.

(2.) That the defendant was ready to repair, but that reasonable time for so doing had not elapsed before the commencement of the action.

(3.) That the plaintiff himself repaired the defects alleged, and thereby prevented the defendant from repairing and rebuilding.

## FORMS OF PLEADINGS

### **Form 134. — Plea that defendant kept the premises in repair.**

And now comes the defendant and answering says that he did, at all times during the tenancy set forth in the plaintiff's declaration, keep the said tenement in good and tenantable repair, order, and condition; and that he did at all times during the said tenancy use said premises in a tenant-like and proper manner.

## *2. Lessor against Assignee of Lessee*

### **Form 135. Plea of assignment of interest before breach.**

And now comes the defendant and answering says that before the breach of covenant alleged in the plaintiff's declaration [or before the said rent became due], he, by deed, assigned over to *E. F.* the said premises for the residue and remainder of his said term therein, and the said *E. F.* then entered into the same and became possessed thereof.

### **Form 136. Plea denying assignment.**

And now comes the defendant and answering says that the estate of the said *E. F.* [lessee] of and in the said premises, with the appurtenances, did not vest in the defendant by assignment as alleged in the plaintiff's declaration.

## *3. Assignee of Reversion against Lessee*

### **Form 137. Plea denying assignment.**

And now comes the defendant and answering says that the said *A. B.* [lessor] did not assign to the plaintiff as alleged in the plaintiff's declaration. Also that the reversion in the said demised premises did not belong to the said *A. B.* [lessor], as alleged in the plaintiff's declaration.

### **Form 138. Plea of payment to original lessor.**

And now comes the defendant and answering says that he has paid to *M.* [original lessor] the sum of *one hundred and fifty dollars* in satisfaction and discharge of the sum claimed by the plaintiff in his declaration; and the plaintiff says that at the time of said payment he, the defendant, had no knowledge or notice of the assignment by the said *M.* to the plaintiff of the

## ANSWERS IN TORT

reversion in the demised premises, or of any title or interest in the said reversion, or in or to the money so paid by the defendant to *M.*, or any part thereof.

### 4. *Agreed Tenant against Owner*

**Form 139. Pleas to action for failure to grant lease.**

(1.) That the plaintiff was not ready and willing to accept lease.

(2.) That the defendant had not, until the bringing of the action, been in a situation to grant, and could not legally grant, the lease.

(3.) That a reasonable time for granting the lease had not elapsed.

## D. ANSWERS IN TORT

### 1. *Landlord against Tenant*

**Form 140. Plea to an action for waste denying tenancy.**

And now comes the defendant and answering says that he did not become the tenant of, or hold or enjoy, the said dwelling-house and premises as tenant to the plaintiff on the terms alleged in the plaintiff's declaration.

**Form 141. Plea to action for removing fixtures.**

And the defendant answering says that the tenement mentioned in the plaintiff's declaration was let to the defendant for the purpose of his using, exercising, and carrying on the trade and business of a *baker*; and that he, the defendant, in the course of the said trade and business and for the purpose of carrying on the same in the said tenement, during the said tenancy, erected and set up in the said tenement in a careful and proper manner the said fixtures, to wit: [*enumerate articles generally*]; so that the same could be removed without substantial damage to the said tenement. And the defendant says that during the said tenancy, he caused his servants to take down and remove the said fixtures, doing no unnecessary damage to the said tenement; and the defendant has since, at his own expense, repaired all damage which had arisen from the said erection and removal of the said fixtures.

2. *Tenant against Landlord*

**Form 142. Answer in action for personal assault during entry.**

1. (*General denial.*)

2. (*Denying use of improper force.*) And for further answer the defendants say that said Z. was the lessee under a lease in writing of a certain farm and buildings thereon, situated in E. in said county, and of which he had the immediate right of possession, and that said plaintiff was wrongfully in and upon said premises, and that the said Z., and the said A. acting for and in behalf of said Z., took possession of said premises in a peaceable and quiet manner, using no more force than they were legally entitled to use, and if the plaintiff shall show any assault upon the plaintiff, the defendants say that all that was done by them or either of them was done in taking possession as aforesaid, as they had a right to do, and that no more force was used than what they had a right to use, and was needful and proper to be used in such case; and they deny that any damage was suffered or that any such act took place as the plaintiff alleges.

And further answering the defendants say that the said A. was the owner in fee of a certain farm, and the buildings thereon, situated in E., in said county, and of which she had the immediate right of possession, and that said plaintiff was wrongfully in and upon said premises, and that the said A., and the said Z., acting for and in her behalf, took possession of said premises in a peaceable and quiet manner, and using no more force than they were legally entitled to use, and if the plaintiff shall show any assault upon the plaintiff, the defendants will show that all that was done by them or either of them was done in taking possession as aforesaid, as they had a right to do, and that no more force was used than what they had a right to use, and was needful and proper to be used in such case; and they deny that any damage was suffered or that any such act took place as the plaintiff alleges.

**Form 143. Answer to action for eviction.**

1. (*General denial.*) And now come the said defendants and for answer say that they deny each and every item, allegation, and particular in plaintiff's declaration contained.

2. (*Forfeiture.*) And further answering defendants say that if plaintiff shall show that he ever has any right to or estate or tenancy in the close in plaintiff's declaration mentioned, defendants will show that the same was created and held under said defendant *H.*, under and upon the conditions, terms, covenants, and agreements in a certain written and printed paper contained, a copy whereof is hereto annexed, made and entered into by and between plaintiff and said defendant *H.* [*lessor*], and defendants say that the plaintiff had before the entry set forth in his declaration without the consent of the lessor, his heirs or assigns, suffered alterations and additions to be made to said premises; and had made and suffered waste thereof, and had made and suffered an unlawful and improper use of said premises, and had not kept the premises in such repair as the same were in at the time of commencement of said plaintiff's term, reasonable use and wearing thereof, and damage by fire or other unavoidable casualties excepted, and had wholly neglected and refused to pay the rent as in said writing it is covenanted and agreed by said plaintiff; wherefore and by reason whereof plaintiff's tenancy, right, and estate in and to said close had wholly been forfeited to said defendant *H.*, and become determined; and said defendants had thereby the right to enter and take possession of said close for said *H.*, and said plaintiff had no right whatever to retain possession of said close against said *H.*; and defendants and said *H.* had a right to expel plaintiff from said close, and said defendants by reason of such forfeiture only entered said premises, and did such acts as were necessary to enable *H.* to determine plaintiff's estate therein, and to retake possession thereof, and use no more or different force than was necessary therefor, and in all in accordance with the considerations, covenants, and agreements in said writing contained.

And further answering defendants say that said plaintiff at the time of said entry by defendants had no right to or estate in or right of possession of said close, but that the right of possession was in said defendant *H.*; and that said defendant *H.* had the right to enter and expel said plaintiff by force, if necessary, and to remove him and family and goods therefrom, and that the defendant *H.* only exercised said right, and used no more or

## MISCELLANEOUS FORMS

other force than was necessary, and said defendants only acted for said *H.* and at said *H.*'s request, to aid and assist him in the rightful taking possession of said close.

### 3. *Landlord against Third Person*

**Form 144. Plea to an action of tort for injury to reversion.**

And now comes the defendant and says that the premises mentioned in the plaintiff's declaration were not, nor was any part thereof, in the possession or occupation of the said *E. F.* as tenant to the plaintiff, as alleged in the plaintiff's declaration.

And the defendant further answering says that the reversion of the said premises and appurtenances, or any part thereof, or of the said several things or any of them, so fixed, fastened, and set up in or upon the same as alleged in the plaintiff's declaration was not in the said plaintiff, and did not belong to him as alleged.

**Form 145. Plea of freehold, in action of trespass.**

And the defendant comes and says that a part of the close mentioned in the plaintiff's writ was the soil and freehold of the defendant, the same being described as follows, *etc.*

Upon his own knowledge he denies that he broke or entered any part of said close, except the part above described.

## E. MISCELLANEOUS FORMS

**Form 146. Declaration on appeal bond in summary process.**

And the plaintiff says that the defendants executed to him a bond, a copy of which is hereto annexed, by which they acknowledge themselves to be holden and firmly bound to the plaintiff in the sum of *five hundred dollars*, which sum they owe and unjustly detain from him.

And the plaintiff says that the said bond was subject to certain conditions therein written, to wit: that if *C. S.*, one of the obligors under said bond should enter and prosecute with effect his appeal in Superior Court in the County of *M.* then next to be holden at *L.* from a judgment written in the *First District Court of Eastern Middlesex* in an action brought by *W. P.* against *C. S.* for the possession of certain real estate described in said

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writ, and if the said *C. S.* should satisfy any judgment which might be entered against him in said Superior Court, and all rents due or to become due, damages and costs upon said appeal within thirty days of said judgment, then the said bond was to be void, otherwise to remain in full force and virtue.

And the plaintiff says that judgment was rendered in the Superior Court against *C. S.* for the possession of the premises described in said writ and for *sixty-eight and 1/8* dollars, costs of said action, and the plaintiff says the said *C. S.* has not within thirty days of said judgment or at any time before the bringing of this action paid the sum of *sixty-eight and 1/8* dollars, cost of this action, or any part thereof, or the rent due or to become due of the premises described in the said writ, or any part thereof, or the damages sustained by the plaintiff by reason of the withholding of the said demanded premises, and by reason of injury done thereto, or any part thereof, which is the breach of said bond complained of. Wherefore the sum of *five hundred* dollars mentioned in said bond became due absolutely to the plaintiff, together with damages for the detention of the same, yet the defendants herein have not paid the said sum of *five hundred* dollars to the plaintiff, or any part thereof, and though often requested to pay have refused, and still refuse so to do. Wherefore he brings his suit.

### Form 147. Answer in summary process.

And now comes the defendant and says that he is not guilty in manner and form as alleged; and denies that he holds the premises named in the plaintiff's writ unlawfully and against the plaintiff's right.

### Form 148. Writ of ejectment.

(*Ejectione firmæ.*)

And the plaintiff says that one *P.*, by his lease in writing under seal, duly made, executed, and recorded in the registry of deeds of said County of *Essex*, did heretofore, to wit: on the *ninth* day of *April*, in the year *eighteen hundred and sixty-seven*, demise unto one *F.* the following-described premises, to wit: a certain parcel of real estate, situated in *Salem*, in the County of *Essex*, aforesaid, and bounded and described as follows. to

## MISCELLANEOUS FORMS

wit: *the land and buildings known as the "Price Estate," situated on E. and W. Streets in Salem aforesaid, comprising the whole estate bounded, etc., to have and to hold the same to the said F., his executors, administrators, and assigns, from the ninth day of April in the year eighteen hundred and sixty-seven, for and during the term of twenty years thence next ensuing, and fully to be complete and ended. And said F. entered upon said premises and was possessed thereof. And thereafter, to wit: on the twenty-ninth day of July in the year eighteen hundred and seventy-five, the said F., being still possessed of said premises, did sell and assign his said lease, and the term aforesaid, for divers good and valuable considerations, unto the plaintiff, by an assignment thereof in writing, under seal, duly made, executed, and recorded in the aforesaid registry of deeds.*

And the plaintiff says that by force of said lease, and said assignment thereof to him, as aforesaid, the said demised premises, for the then unexpired portion of the term aforesaid, to wit: from said *twenty-ninth day of July, eighteen hundred and seventy-five* ensuing, vested in him, and he was possessed thereof; and that the defendants thereafter entered into the tenement and premises aforesaid, which the said P., had demised as aforesaid, for the term aforesaid, assigned to plaintiff as aforesaid, which is not yet expired, and ejected the plaintiff therefrom, and unjustly withholds from the plaintiff the possession thereof, to the damage of the plaintiff of *thirty thousand dollars*; and therefore he brings his suit.



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